244 - 20174

JOHN F. DEVINE, Adm'r of the Estate of JOHN WILLIAM TULLOCK, deceased,
Defendant in Error,

vs.

W. G. JOHNSON, Receiver of THE CHICAGO & MILWAUKEE ELECTRIC RAILROAD COMPANY,
Plaintiff in Error.

ERROR TO THE CIRCUIT COURT OF COOK COUNTY.

190 I.A. 6

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a judgment of the Circuit Court for $10,000 against the plaintiff in error in favor of the defendant in error, administrator of the estate of John William Tullock, deceased, for damages resulting to the widow of the intestate from his death, alleged to have been caused by the negligence of plaintiff in error. The tracks of the railroad company at Highland Park are laid on top of an embankment 15 to 20 feet above the level of the street on which the deceased approached the tracks. The Waukegan road runs parallel with and forty or fifty feet east of the foot of the embankment and turns to the eastward at a point perhaps 60 feet south of the south end of the Morain Road station platform. From the turn of the road to the eastward it is called the Morain Road, from the turn northward, the Waukegan Road, but it is a continuous road or street on a level with the surface of the ground on either side. There is a walk on the easterly side of the Morain Road up to the east side of the Waukegan Road and another walk or continuation of the same walk from the west side of the Waukegan Road to the foot of a pair of stairs leading to the top of the embankment. The accident occurred Christmas

244 - 20174

JOHN F. DEVINE, Adm'r of the Estate of JOHN WILLIAM TULLOCH, deceased,

Defendant in Error,

vs.

W. G. JOHNSON, Receiver of THE CHICAGO & MILWAUKEE ELECTRIC RAILROAD COMPANY,

Plaintiff in Error.

ERROR TO THE CIRCUIT COURT OF COOK COUNTY.

HON. JUSTICE DUNN DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a judgment of the circuit court for $10,000 against the plaintiff in error in favor of the defendant in error, administrator of the estate of John William Tulloch, deceased, for damages resulting to the widow of the intestate from his death, alleged to have been caused by the negligence of plaintiff in error. The tracks of the railroad company at Highland Park are laid on top of an embankment 15 to 20 feet above the level of the street on which the deceased approached the tracks. The Waukegan road runs parallel with and forty or fifty feet east of the foot of the embankment and turns to the southward at a point perhaps 60 feet south of the south end of the Ravin Road station platform. From the turn of the road to the southward it is called the Ravin Road, from the turn northward, the Waukegan Road, but it is a continuous road or street on a level with the surface of the ground on either side. There is a walk on the easterly side of the Ravin Road up to the east side of the Waukegan Road and another walk or continuation of the same walk from the west side of the Waukegan Road to the foot of a pair of stairs leading to the top of the embankment. The accident occurred Christmas

Day, 1910. A regular car ran south at 7:40 P. M., which did not stop at the Morain Road station except to discharge passengers, or when there were persons on the platform west of the west, the south, bound track, who indicated a wish to take the car. The deceased, with three companions, approached the tracks on the walk alongside of the Morain Road. That the car was in plain sight before the deceased reached the steps leading to the top of the embankment was proved by the testimony of his three companions, who were called as witnesses by the plaintiff. Marshall, the leader, testified that he saw the car when it was half a mile away, that its lights were lit, and after he saw it he walked up the stairs. Gilbert Halcrow testified that he saw the car when it was 300 feet away, and John Halcrow testified that when he and deceased were below the stairs he said to deceased, "I wonder if we will catch that car", and deceased answered, "Sure we will", thus showing that deceased knew the car was coming when he started to go up the stairs. From the top of the stairs a walk led to the south end of the east platform and from the center of that platform at a point about 75 feet north of the top of the stairs a walk led across the tracks to the west platform. The deceased and his companions attempted to cross the tracks at an angle going northwesterly. The other three men crossed the west track safely, but the deceased in attempting to cross it a few feet south of the south end of the platform was struck by the car and killed.

The evidence in the light most favorable to the plaintiff, with all the inferences that could be legitimately drawn from it, did not tend to prove the exercise of ordinary care on the part of Tullock. The question whether Tullock exercised ordinary care is to be determined, not by the probabilities when he ascended the stairs, but rather by the situa-

Day, 1910. A regular car run south at 7:40 P. M., which did not stop at the Norwin Road station except to discharge passengers, or when there were persons on the platform west of the west, the south, bound track, who indicated a wish to take the car. The deceased, with three companions, approached the tracks on the walk alongside of the Norwin road. When the car was in plain sight before the deceased reached the steps leading to the top of the embankment was proved by the testimony of his three companions, who were called as witnesses by the plaintiff. Kerwall, the leader, testified that he saw the car when it was half a mile away, that its lights were lit, and after he saw it he walked up the stairs. Gilbert Halpern testified that he saw the car when it was 300 feet away, and John Halpern testified that when he and deceased were below the stairs he said to deceased, "I wonder if we will catch that car", and deceased answered, "Sure we will", thus showing that deceased knew the car was coming when he started to go up the stairs. From the top of the stairs a walk led to the south end of the east platform and from the center of that platform at a point about 75 feet north of the top of the stairs a walk led across the tracks to the west platform. The deceased and his companions attempted to cross the tracks at an angle going northeasterly. The other three men crossed the west track safely, but the deceased in attempting to cross it a few feet south of the south end of the platform was struck by the car and killed.

The evidence in the light most favorable to the plaintiff, with all the inference that could be legitimately drawn from it, did not tend to prove the exercise of ordinary care on the part of Tullock. The question whether Tullock exercised ordinary care is to be determined, not by the proo-

tion when he reached the tracks and attempted to cross the south bound track in front of an approaching car, when the street was clear, he knew a car was coming and there was no obstruction to the view nor necessity for making the attempt. The evidence established that Fullock misjudged his ability to cross in front of the approaching car, and on account of his error of judgment, for which no one else could be held responsible, lost his life. Fullock could see the car and the entire situation was open before him. He was not on any crossing for pedestrians and needed no signal or warning that a car was approaching - a fact that no one could fail to observe. The case is, we think, within the rules stated in Roberts v. C. C. Ry. Co., 262 Ill., 228.

For the error indicated the judgment is reversed.

REVERSED.

244 - 20174 FINDING OF FACT.

The Court in this case finds as a fact from the evidence in the record that plaintiff's intestate, John William Tullock, was not, at the time he came to his death, in the exercise of ordinary care.

347 - 20282

ORTHWEIN MATCHETTE COMPANY, Defendant in Error, vs. FINLEY BARRELL, EUGENE R. PIKE and WILLIAM H. WHITE, etc., doing business as FINLEY BARRELL & COMPANY, Plaintiffs in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

190 I.A. 11

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The plaintiffs in error, copartners under the name of Finley Barrell & Co., are commission merchants in Chicago, and at the time of the transactions in question the plaintiff corporation was their correspondent at Kansas City. March 25, 1911, the Wichita Board of Trade adopted a resolution which was in substance an offer to the plaintiff corporation that if plaintiff would install and maintain in the rooms of said Board of Trade an office and furnish continuous quotations of prices of grain at Chicago and Kansas City, said Board of Trade would guarantee to said corporation business equal to the purchase and sale of a million bushels of grain per month, and in case the business did not equal that amount, would pay a sum equal to commissions on the deficiency; such arrangement to continue for six months. The plaintiff accepted the offer and April 11, 1911, entered into a contract with Barrell & Co., whereby the latter agreed to install a private wire from the office of the plaintiff in Kansas City to its office in Wichita, and the plaintiff agreed to send to Barrell & Co. all the grain business it received from the Wichita Board of Trade except that to be executed at Kansas City, and guaranteed that the business so to be sent should equal the purchase and sale of a million of

bushels per month, and agreed in case of a deficiency to pay to Barrell & Co. a sum equal to commissions on such deficiency. The wire was installed and business carried on for six months, during which time the business sent by the Wichita Board of Trade did not amount to a million of bushels per month, and the Board of Trade paid to plaintiff by reason of such deficiency $2076.26, and the plaintiff paid to Barrell & Co. under the contract of April 11, $1751.82. At the end of six months the Wichita Board of Trade declined to renew the contract with the plaintiff unless the provisions as to sending a specified amount of business was omitted, and in case the business sent to plaintiff exceeded one million of bushels per month, the commissions on the excess should be repaid to said Board of Trade until the penalties aggregating $2076.26 theretofore paid by the Board of Trade had been repaid. September 11 the plaintiff advised Barrell & Co. of the position taken by the Board of Trade and White, one of the members of the firm, who acted for the firm in the matter, telegraphed plaintiff that he thought it was important that "we" be present at Wichita at the meeting, when the question of renewing the contract should be taken up. White was notified of the proposed meeting and went to Wichita with Machette, who represented the plaintiff. There, September 26, an oral agreement was arrived at that the business should be continued for twelve months from October. The provision as to sending a specified amount of business was omitted and it was agreed that commissions on excess of business over a million of bushels per month should be paid to the Board of Trade by plaintiff in repayment of the penalties theretofore paid. A written contract covering the agreement of September 26 was made, dated October 17, 1911, and submitted by the plaintiff to White, with a request that he re-

turn it with his approval or suggestions. In answer White wrote that he had no suggestions to make regarding the memorandum agreement, as same to his mind covered all the points. The business thereafter sent by the Board of Trade to plaintiff exceeded a million of bushels of grain per month, and out of the commissions on the excess the plaintiff repaid to the Board of Trade the $2076.26 of penalties it had received during the preceding six months from the Board.

The contention of defendant in error is that Barrell & Co., through White, assented to the agreement of September 26 and agreed to repay the portion of the penalties paid to them by plaintiffs, out of the commissions on new business in excess of a million bushels per month, and the plaintiffs in error contend that they made no such agreement. This, it is admitted, is the only question in dispute between the parties. This question was submitted to the jury and their verdict was in favor of the contention of the defendant in error.

We think the evidence in the record to sustain the verdict is abundant, and that the motion for a new trial was therefore properly overruled, and the judgment is affirmed.

AFFIRMED.

363 - 20299

MARY SAMPSON,
Appellee,

vs.

SANFRID HARMSTROM et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

190 I.A. 12

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

The bill in this case is a bill to rescind a transaction between the complainant, Mary Sampson, and the defendant Sanfrid Harmstrom on the ground that a fiduciary relation existed between said parties and that the complainant was induced to enter into such transaction through the false and fraudulent representations of Harmstrom. Harmstrom was a real estate and loan broker. In 1906 he prepared papers for a loan of $600 complainant made to one Lindblatt, secured by his trust deed. In October, 1908, the purchaser of the mortgaged premises wished to pay off the mortgage and Harmstrom wrote complainant October 27 to bring him the papers so that he might prepare a release deed. She took the papers to Harmstrom and he gave her a receipt for them dated October 29. Soon afterwards the mortgage was paid and complainant then, with the $600 she received therefor, bought of Harmstrom a note of Swanson for $600, secured by first mortgage. The Swanson note and interest coupons were payable at Harmstrom's office and complainant went there and received her interest, but transacted no other business at Harmstrom's office or with Harmstrom than to receive her interest from 1908, when she bought the Swanson note, until 1910, when she made the exchange in question with Harmstrom, and in the meantime she had the Swanson note and mortgage in her possession. January 15, 1910, Harmstrom wrote her that if she had $400 to add to

the $600 Swanson note he would take that note and give her a note for $1000 secured by first mortgage. Complainant went to Harmstrom's office and they soon began talking about an exchange of properties. Complainant had a cottage and lot in Austin, subject to a mortgage, and Harmstrom had two two flat buildings in Evanston, each subject to a mortgage of $3600. An exchange was agreed on in April and an agreement in writing made June 1. The basis of the exchange was that complainant should give Harmstrom the equity in her Austin property, the Swanson note for $600 and $450 in cash for his equity in the two Evanston buildings, each subject to a first mortgage for $3600, and also give to Harmstrom her two sets of notes, one for $50, payable July 1, and 42 for $75.00 each, one payable on the first day of each successive month beginning August 1, 1910, and two trust deeds, one securing one of said sets of notes on one of the said flat buildings, and the other securing the other set on the other building. The transfers and conveyances agreed on were executed June 1, 1910. Complainant employed Harmstrom to collect the rents and he collected them up to October 1, 1910, when she took the business out of his hands and gave it to one Zimmerman. She took the collection into her own hands in December, 1910, and collected the rents until March, 1911, when she again gave the collection of the rents to Zimmerman and he collected the rents until July, 1912, and accounted for the same to her.

Complainant failed to pay all the interest on the first mortgage as it became due or all of her notes secured by the second trust deed on the Evanston buildings as they came due, or all of the taxes, and July 25, 1912, there was due to Harmstrom from her for such interest and on her notes and the mortgage security therefor $3857.93. July 24, 1912, Harmstrom told complainant that she must pay him something

on account or permit him to collect the rents; that he could not permit her to collect the rents and keep the money, and he asked her to give him a quit claim deed so that he could collect the rents, and told her that he would foreclose if she would not do so. He also told her that he would give her time to sell the property and pay him. She the next day made and delivered to him a quit claim deed as requested. Less than three months afterward, October 11, 1912, she filed the bill in this case. In addition to the facts above stated, it appears from the record that complainant had some vacant lots in Chicago which she listed with Harmstrom for sale, but when such lots were so listed, whether before or after the execution of the quit claim deed is not shown.

The facts proved on the hearing of this case do not show that there was any fiduciary or trust relation between the parties nor any ground for rescinding either the contract for the exchange of properties or the quit claim deed of complainant to Harmstrom. It is true that complainant delivered the Lindblatt papers to Harmstrom so that he might receive payment thereof, but that was in 1908, and a few weeks later payment was made and with the money so paid complainant bought of Harmstrom the Swanson note and mortgage, and it is also true that Harmstrom once called complainant one of "his investors." When a mortgage banker or dealer in securities sells to a person a note secured by a mortgage, the buyer is an investor, but the relation growing out of the transaction is that of banker and customer or seller and buyer, and is not a fiduciary or trust relation. When one person entrusts money to another to invest for him and the person who is entrusted with the money selects the security and makes the investment, a trust or fiduciary relation is created; but no such case is shown by the evidence in this record. Complainant did not place money

in Harmstrom's hands to invest for her, nor did he buy for her the Swanson note. She bought the Swanson note and the fact that she paid for it with money which Harmstrom had collected for her and that the note and interest coupons were payable at Harmstrom's office and the interest was paid there and turned over to her, did not create between them a trust or fiduciary relation. The proposal made by Harmstrom to complainant in his letter of January 15, 1910, was in substance to borrow of her $1000 and take the Swanson note as part of the $1000 and give her his note for $1000, secured by first mortgage. This was a proposal to borrow money from complainant, not a proposal to invest money for her. There was no fiduciary or trust relation existing between the parties when the agreement for the exchange of properties was made June 1, 1910. Between that time and July 25, 1912, when the quit claim deed was made, the only business transacted between the parties was that Harmstrom collected the rents on the Evanston buildings from June 1 to October 1, 1910, and clearly no fiduciary relation was created or grew out of such transaction as to any matter other than the rents collected, and those rents Harmstrom accounted to her for, and there is no claim that he did not truly account to her for the rents so collected.

The quit claim deed was an equitable mortgage giving to complainant the right to redeem, but out of the giving and acceptance of such equitable mortgage no fiduciary relation was created. If it be assumed that complainant listed her vacant lots with Harmstrom before July 25, 1912, such listing is not material to the question here presented. Such listing made Harmstrom complainant's agent as to such lots, but as to them there was no transaction and the listing of them did not make Harmstrom complainant's general agent.

The proofs in the record do not support the allegations of the bill, and the decree is reversed and the cause remanded with directions to dismiss the bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

378 - 20316

OSCAR G. LEE,
Appellee,

vs.

S. E. PERLBERG and CARL JOSEPH, Trading as S. E. PERLBERG & COMPANY,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

190 I.A. 13

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This appeal brings in review a judgment for $1288.48 recovered by plaintiff Lee against defendants Perlberg and Joseph on a directed verdict. January 26, 1911, plaintiff Lee demised by written lease certain premises at Oklahoma City, Oklahoma, to one Minton for a term of five years from February 1, 1911, at a rental of $225 per month. July 24, 1911, Minton assigned his interest in the lease to defendants by an assignment in writing endorsed thereon, containing the following provision: "We, said assignee, hereby assume and agree to make all the payments yet to be made, and perform and abide by all the covenants, conditions and provisions of the written lease, by said lessee to be performed." On the same day by an agreement in writing between plaintiff and defendants, the rent was reduced to $200 per month. February 5, 1912, defendants assigned in writing the lease to one Fricke and, "guaranteed the performance by said assignee of all the covenants on the part of the lessee in said lease contained." Fricke took possession of the demised premises and paid the rent up to April 1, 1912. The suit was brought to recover rent at $200 per month from April 1, 1912, to the beginning of the suit, less credits of $186.52 and $40, and the amount due is not disputed, if the defendants are liable.

The assignment of the lease by Hinton to defendants recites that they assumed and agreed to make all the payments and to perform all the covenants by said lessee to be performed. The fact that the defendants in and by their assignment of the lease to Fricke guaranteed the performance by Fricke of the covenants by the lessee to be performed, does not affect their liability as assignees under the assignment from Hinton, in and by which they assumed the obligations of the original lessee. The defendants received possession of the premises from Hinton and thereby was created a privity of estate with the lessor which was terminated by the assignment and transfer of possession to Fricke; but the privity of contract - the contractual liability of defendants to plaintiff - was not thereby terminated. No valid reason is apparent to us why the defendants should not pay the rent they assumed.

Springer v. DeWolf, 194 Ill., 318.

But if the action be considered as based on the guaranty alone and the defendants as mere guarantors and sureties for Hinton, no defense is shown. Here delay in bringing suit or failure to use diligence in attempting to collect from the principal, will not discharge a surety or guarantor. To have that effect there must be a valid and binding agreement for an extension for a definite period entered into on a valid consideration.

Field v. Brokaw, 148 Ill., 654, 671.

The Section of the Oklahoma statute admitted in evidence is only declaratory of the common law rule in force in this State, and by its admission in evidence the defendants were not prejudiced.

The judgment is affirmed.

AFFIRMED.

70½ - 19836

MARIE A. FELLOWS-KIMBROUGH,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

190 I.A. 17

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff was injured while a passenger on one of defendant's street cars. She brought suit and had judgment for $3,750, from which defendant has appealed. 35th street in Chicago runs east and west, and Indiana avenue north and south, and where they intersect the street car lines of the defendant cross each other at right angles. On the day of the accident plaintiff was riding on an east bound 35th street car. As it was crossing Indiana avenue a car coming from the south on Indiana avenue did not stop to permit the 35th street car to pass safely but ran into it, knocking it partly off the track. It is conceded that under the circumstances the Indiana avenue car should have stopped at the south cross-walk and have permitted the 35th street car to make the crossing with safety. The explanation of this failure to stop is that although the motorman on the Indiana avenue car attempted to stop it at the usual place by turning the controller handle, which would shut off the electrical power, his attempts were unavailing by reason of a defect in the mechanism in the controller box. The particular defect is said to have been that one of the "fingers" which are fastened to the "terminals" in the controller box was bent so as to prevent the turning of the controller handle. We do not deem it necessary to give a fuller or more accurate description of this machinery, for we are of the opinion that the jury were justified in finding that the

failure to stop involved another device connected with the car. Over the head of the motorman was attached a canopy switch. One of its purposes is automatically to turn off the electrical power when there is an overload of electrical current. It also can be operated by turning a switch handle which shuts off the power. It is thus used to turn off the power when for any reason the mechanism of the controller box fails to turn off the current. It was a provision made and installed for just such an emergency as occurred in the present situation, and in fact was the means which the motorman finally used to bring his car to a stop.

This car was about 150 feet south of the south cross-walk of 35th street when the motorman attempted to turn the controller handle to stop the car but found that he could not turn it. He tried several times to turn it but without success. He then applied the air brake but this could not arrest the progress of the heavy car with the power still on. When his car was near the 35th street car, apparently for the first time he thought of the canopy switch and turned its handle, which threw off the power, and, the air brake being on, it soon stopped the car but not before it had run into the side, bear the rear, of the 35th street car.

It would be difficult to lay down any rule as to just how soon or how long after the motorman discovered that his controller handle could not be operated that he should have had recourse to the canopy switch for the purpose of turning off the electrical current. It might be said that many accidents happen through the failure of someone to think and act with sufficient quickness, and ordinarily such failure is properly called negligence. Whether in this case the failure of the motorman to use the readily available canopy switch was negligence which caused the collision was peculiarly

for the jury to determine, and if the jury should be of the opinion that the motorman was negligent in this respect we can see no sufficient reason for saying that its verdict was not justified.

Defendant claims that the verdict is excessive. There was testimony tending to show that the 35th street car was struck near the rear and pushed off the track until it stood parallel with the Indiana avenue car, which ran past it northward about 30 feet before it stopped. Plaintiff was thrown to the floor and received bruises on her body, arms and legs. There was a fracture of one or two ribs. She appeared dazed and sick, and a few days thereafter a swelling appeared on her left breast. There was abundant testimony to the effect that before the accident she had apparently been in robust health and very strong. She was a physician in active practice, earning $200 a month. Many witnesses testified that since the accident she has appeared very feeble and seemed to need assistance in moving around and to be in pain, and that she has spent a large part of her time in bed. The medical experts testifying on her behalf said that she was suffering from traumatic neurasthenia, and this opinion was combatted by equally skilfull and experienced medical experts testifying on behalf of the defendant. The variant opinions as to her condition were submitted to the jury, and the verdict is not manifestly against the weight of the evidence. It is to be noted that on a former trial the jury returned a verdict for nearly twice the amount of the present verdict.

Complaint is made of the rulings of the court upon questions and answers upon the trial, and upon an instruction given at the request of the plaintiff, but such rulings and instruction while perhaps properly open to criticism do not compel a reversal.

We agree with defendant that plaintiff's attorneys in addressing the jury were guilty of improprieties which deserve censure, but this conduct does not seem to have worked to the disadvantage of the defendant. Rather this appears to be one of those cases, which are observed not infrequently, where extravagant statements and violent denunciation in addressing the jury have reacted against the person so offending. In another case the things complained of might be said to be so prejudicial as to require a reversal, but we do not think this is true of this case.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

238 - 20168

VON PLATEN & DICK COMPANY,
a corporation,
Plaintiff in Error,

vs.

CHICAGO VENEERED DOOR COMPANY,
a corporation,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

190 I.A. 23

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit claiming damages arising out of purchases of doors from defendant. Defendant filed a set-off claiming a balance due on a sale of doors to plaintiff. The trial court was of the opinion that the plaintiff was not entitled to recover and that defendant was, and directed a verdict for the amount of defendant's set-off, and judgment was entered which the plaintiff seeks to have reversed.

The first item of plaintiff's claim was for $36, which is said to be an excess of cost to plaintiff over the contract price at which defendant had agreed to furnish ten doors but had failed so to do. It is undisputed that plaintiff would not agree to pay for these doors but would only give defendant credit on an alleged claim arising out of another sale. We know of no rule which requires a seller to deliver goods to a buyer where the buyer before delivery has notified the seller that he will not pay for them. Under such circumstances the seller is not bound to deliver (Dwyer v. Duquid, 70 Ill. 307), and therefore plaintiff was not entitled to its claim of damages for defendant's refusal to deliver.

The other item of plaintiff's claim is for $110.01, said to be a balance due it after charging to defendant the cost for labor, etc., in sandpapering and putting in the con-

dition agreed upon a lot of doors sold and delivered by defendant to plaintiff. It is not necessary to narrate the evidence, all of which we have considered, for we are of the opinion that plaintiff failed to establish its claim. Among other controlling considerations is this, that plaintiff had the doors from about October 1, 1911, until about June 1,1912, without making any complaint concerning their condition. If they were not of the quality or description ordered plaintiff should have rejected them within a reasonable time, and not appropriated them to its own use. American Theatre Co. v. Siegel, Cooper & Co., 221 Ill. 145. There was testimony tending to show that the exposure of the doors during these winter months would roughen them. Clearly defendant could not be charged with the expense of removing roughness which was caused by plaintiff's own act.

The only answer made by plaintiff to defendant's claim of set-off was that the cost to it of putting the doors in condition not only exhausted the balance due defendant, but left a balance due plaintiff as above stated. The trial court properly being of the opinion that plaintiff was not entitled to such credits as it claimed, and the items of amounts, dates of delivery and prices of defendant's statement not being in dispute, did not err in directing a verdict for the amount of defendant's set-off. Regardless of any rule of the Municipal Court, we are of the opinion that under the pleadings in the case and the testimony of the plaintiff the correctness of defendant's set-off was admitted.

As plaintiff was not entitled to recover, it follows that there could be no error upon the trial in refusing its testimony as to the time spent in working on the doors to put them in condition; hence it is unnecessary to discuss the inadmissibility of the testimony in the manner

it was offered.

Other points urged by plaintiff as grounds for reversal do not convince us, and the judgment is affirmed.

AFFIRMED.

297 - 20229

F. E. SHORT,
Appellee,

vs.

OREGON SHORT LINE RAILROAD COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

190 I.A. 25

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a shipper, recovered judgment against defendant, a carrier, for damages caused by the death of a number of sheep belonging to plaintiff, at a stopping point for feeding during transportation from Wyoming to Chicago, Illinois. It is claimed that the sheep died from eating poisonous weeds in the pasture furnished by defendant, and the negligence alleged and sought to be proved was the furnishing of the kind of pasture in which they were placed.

We are of the opinion that plaintiff failed to prove the negligence alleged. The facts upon which our conclusion is based are as follows: The entire shipment numbered 1996 head of sheep. Grand Island, Nebraska, the place in question, was the third feeding point from the initial point of shipment. The sheep arrived there in good condition about 4 P. M., June 23, 1909, were unloaded and placed in a pasture. On the following morning 133 of the sheep were found to be dead, or nearly so, were badly bloated and frothing from the mouth and nose. The remaining sheep were in bad condition, and 29 of them died after leaving Grand Island.

The evidence shows that the pasture in question was part of the Grand Island stock yards, containing 1500 acres of pasturage, divided into 26 different enclosures by wire fences. There were 25 acres in this particular pasture field,

which is called No. 104, and there was ample room and pasturage for several times the number of sheep placed therein on this occasion. The vegetation in this pasture field was similar to that in all the other pastures, all of which had been broken up and sowed in the fall and winter of 1906 and 1907 in Kentucky blue grass, English blue grass, and other grasses of a kind usually furnished for feeding. Most of the pasture was in blue grass and there was a sprinkling of some common weeds, like the smart weed, pig weed, etc., but weeds were very scarce. The vegetation in general was luxuriant and adapted to the proper feeding of sheep. It had been used for this purpose for the two previous years. Many thousand head of sheep and also many horses grazed in the pasture during the summer of this occurrence. The horses were not affected in any way, and while some of the sheep died, yet the number was less than the normal death rate of sheep.

We are of the opinion that the evidence establishes that the sheep died from eating too freely of rich and nutritious grasses growing in the pasture. We shall not detail the testimony of the witnesses to this effect, which includes a minute description of the organs of digestion of sheep and the effect of such grasses as were eaten. It is sufficient to say that it appears to be proven beyond any reasonable question that the eating by these sheep of large quantities of green grass, timothy and clover would tend to cause fermentation of the food and the production of gas in the stomach, and that this, as is usually the case, brings about suffocation and consequent death. One of the witnesses gives the name of this condition as "tymphanitis" or "meteorism", which is caused by a distension of the gases in the stomach, which is brought about by an oversupply or ingestion of feed.

Such conditions are not infrequent after sheep, under the circumstances here present, are let into pasture. Witnesses testified that there were no poisonous weeds in the pasture, and no witness contradicted this. Plaintiff having failed to prove the presence in the pasture of anything which in itself is harmful for sheep to eat, there was therefore no negligence by defendant with reference to the kind of pasture furnished, and plaintiff is not entitled to a recovery in this case.

To any suggestion that it was negligence to place the sheep in rich pasture and permit them to overeat, it is sufficient to reply that the plaintiff, the owner of the sheep, was traveling with the shipment, and that he was an experienced sheep man, knowing their habits and the results of feeding. He saw the pasture in question in daylight and made suggestions about it and knew its character. If there was any negligence in connection with the duration of the period of feeding, plaintiff was as much in fault as was defendant, and his contributory negligence would bar a recovery. This would be so without reference to any provision in the written contract of shipment.

In the view we have taken of this matter it becomes unnecessary to pass upon other points presented by defendant.

For the reason indicated the judgment is reversed with a finding of fact.

REVERSED.

297 - 20229 FINDING OF FACT.

We find that the defendant, Oregon Short Line Railroad Company, is not guilty of the negligence charged in plaintiff's, F. W. Short's, statement of claim.

330 - 20285

MAYWOOD TRUST & SAVINGS BANK, Appellee, vs. MARGARET B. MARSHALL, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

190 I.A. 27

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Margaret B. Marshall, appellant, claimed right of property in certain household furniture held by the appellee under an attachment writ. Appellant claims under a chattel mortgage. Judgment adverse to this claim was entered, from which she has appealed.

The only question is whether the evidence shows that the furniture she claims is the furniture described in the chattel mortgage. Both the furniture described in the mortgage and that which she seeks in this suit are the ordinary household kind usually found in almost all homes. The only testimony id that of appellant, who testified concerning the transaction of the chattel mortgage from Hiram Brown and wife; in the mortgage the furniture was described as in apartment "B-1, 404 South Ashland Blvd., Chicago, Cook County, Illinois." Subsequently the Browns left this apartment and went away,- plaintiff did not know where. She afterwards received a writing signed by Hiram Brown, addressed "To whom it may concern," purporting to give authority to "Messrs. Marshall & Co." to gain possession of such furniture "as they are entitled to under the terms of a chattel mortgage." This writing is of no importance, as whatever authority the mortgagee had was derived from the chattel mortgage itself. Afterwards she was notified by one F. L. Barth that he had been directed by

"the Browns to turn over certain effects" covered by a chattel mortgage she had. She went to Mr. Barth's house and found there some articles of ordinary household furniture. She left them there, taking away only a picture, which was not levied upon by the attachment writ. She further testified that "I do not know of my own knowledge that the articles found at Mr. Barth's house in Maywood which I have described are the same articles described in the mortgage as contained in 'Apt. D-1' of 404 So. Ashland Blvd. I never saw them before I went to Mr. Barth's house."

We cannot agree that appellant took possession of the property, but even if she did she failed to prove her right to the same. It was incumbent upon her to prove that the furniture in question was the same furniture upon which she had a chattel mortgage, and she herself conceded that she did not know that it was.

It is no concern of appellant's as to who was awarded title in the property, so long as her claim was denied.

There being no errors upon the trial, for the reasons above indicated the judgment is affirmed.

AFFIRMED.

351 - 20286

SIMON HARTMAN,
Appellee,

vs.

JULIUS ANDALMAN,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

190 I.A. 29

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in attachment alleging that defendant was about fraudulently to conceal, assign or otherwise dispose of his property or effects so as to hinder or delay his creditors. Both by general and special verdicts the jury found that the evidence supported plaintiff's contention, and judgment was entered on the verdicts, from which judgment defendant has appealed.

The principal contention of defendant on this appeal is concerned with alleged errors in rulings of the court on the evidence. The points made are many, and most of them highly technical. After giving them consideration we are unable to say that any of the rulings complained of furnish a reason for a reversal.

Much also is said in complaint about the alleged mistreatment by the trial court of defendant and his witnesses and attorney, but we find nothing in this respect of sufficient importance for us to discuss.

There is no reversal error in the giving or refusal of instructions.

We cannot say that the verdicts were against the manifest weight of the evidence. The evidence tended to show that defendant operated a junk yard; that he owed plaintiff for money loaned by plaintiff to defendant; that after demands for its repayment defendant, in substance, told plaintiff that he was going to dispose of his business so

that plaintiff could recover nothing; that the yard occupied by defendant in his business was of large size and at the time of this conversation was well filled with material, and that soon thereafter this was removed. As one witness testified, "the wagons were going back and forth all day long" hauling scrap metal from the yard until there was hardly anything left. Much more testimony of the same sort was given, including the vague and unsatisfactory statements of defendant as to the disposition of the property. We see no reason to disturb the conclusion of the jury.

Defendant moved for a perpetual stay of execution, which was properly denied. The judgment provided only for a special execution against the property attached, and plaintiff was entitled to execution against the garnishee. If defendant thought there was danger of an execution against other property, having in mind his recent discharge in bankruptcy, on which we express no opinion, he should have properly limited his motion.

Other points urged are also without merit.

The judgment is affirmed.

AFFIRMED.

369 - 20306

BALTIMORE TRUST COMPANY,
Appellee,

vs.

CONSOLIDATED ADJUSTMENT COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

190 I.A. 30

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This case involves a contract substantially the same as that passed upon by this court in Fritz v. Consolidated Adjustment Company, No. 19,610, opinion filed October 13, 1914. The material parts of the contract appear in that opinion and will not be repeated here. In that case appellant contended, as it does in this case, that under the terms of the contract sued on it had the right to continue the service until it recovered the amount of the guaranty. We again hold that the contract secured to defendant a reasonable time only after the lapse of three years within which to collect the amount guaranteed to be collected.

The contract now before us contains an alternative provision which was not in the Fritz contract, which is to the effect that the service should be continued "until said company shall reasonably determine that an equitable adjustment of the claims listed hereunder cannot be secured." Evidence was submitted to the jury as to whether under the circumstances this contingency had happened, and we see no reason to disturb the conclusion of the jury to the effect that it had been reasonably determined that an adjustment of the claims could not be secured. In this situation there had been a breach of the guaranty on the part of the defendant and the judgment followed properly.

AFFIRMED.

21070

FRED MILLER BREWING COMPANY,
Appellee,

vs.

MOIR HOTEL COMPANY and
HARRY JAMES,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

190 I.A. 32

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an injunction pendente lite restraining the defendants from using, selling, consuming or giving away upon the premises 17 South Clark street, Chicago, any domestic draught beer other than that manufactured and sold by the complainant, and from displaying any advertising matter upon the premises which shall advertise any domestic draught beer manufactured by any person, etc., other than the complainant. The injunctional order was entered upon bill and answer presented and considered as affidavits. The basis of complainant's action for the injunction was a written contract between the complainant and the Hotel Company, wherein it is said that the Hotel Company agreed to use and advertise upon its hotel pre ises, including No. 17 South Clark street, only the domestic draught beer manufactured by complainant, and the subsequent violation of this agreement.

A number of points are urged as grounds for reversal, but we shall notice only one of these, and this will make unnecessary any consideration of other matters presented. We hold that the premises No. 17 South Clark street are not covered by the contract. The considerations leading us to this conclusion are in part as follows: The Moir Hotel Company at the date of the contract was the owner and lessee

under certain leases, some expiring in the year 2007, others in 2016, of property at the southeast corner of Clark and Madison streets, in Chicago. This property extends southward on Clark street from the corner a distance of 90 feet and eastward on Madison street for a considerable distance, including the premises at 65-67 West Madison street now occupied by the Edelweiss Restaurant. The Hotel Company has arranged for a bond issue of $2,000,000, from the proceeds of which it contemplates the erection and furnishing of a large hotel building on said premises. There is at present in course of construction on a portion of said premises a building which is to be part of the new hotel building and is called the "Addition." Beginning at a point on Clark street 90 feet south of the corner and extending thence southward for 150 feet, the Hotel Company has leases of buildings which expire about the year 1918, and all of the six store rooms in this 150 feet, except one, are sublet to various tenants. One of these store rooms is the premises No. 17 South Clark street. The plans for the new hotel building do not contemplate the use of this 150 feet on Clark street. The premises at No. 17 South Clark street is nowhere mentioned in the contract nor is there any language used which can be said to refer directly to it. The property described as intended to be covered by the contract is (1) "property at the southeast corner of Clark and Madison streets, in the City of Chicago, County of Cook and State of Illinois, now occupied by the Morrison Hotel and Addition," of which the Hotel Company "is the owner or lessee under long term leases"; and (2) "the premises at No. 65-67 West Madison street * * * now occupied by the Edelweiss Restaurant." Manifestly No. 17 South Clark street is not included in the last named property, and we hold that it cannot be said with reason to be included in the first description, which clearly is of

land occupied "under long term leases." We find nothing in the rest of the contract to negative this construction when the entire transaction is considered.

In our opinion the contract was drawn with the intention of covering the premises upon which it was planned the new hotel building should stand and the premises known as "The Edelweiss Restaurant," and not other premises over which any control by the Hotel Company would cease in a comparatively short time.

There is a further provision for a loan from the complainant to the Hotel Company of $50,000, which a plan for its repayment through purchases of beer for its bar-rooms in ten years. This plan could hardly have contemplated a bar-room occupied under a lease for only half that period of time.

After weighing these and other considerations and the arguments and points in opposition, we are of the opinion that it has not been made to appear that the premises described in the injunctional order are covered by the contract between the parties. Therefore the order of injunction is reversed.

REVERSED.

Mar Term 1914

252 - 20182

J. A. LUCAS,
Defendant in Error,

vs.

MALCOLM LAMONT and R. NORMAN BLASEN,
doing business as LAMONT & CHASLE,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

190 I.A. 47

MR. PRESIDING JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

We have not been favored with a brief or argument by the defendant in error in this cause.

We are unable from our inspection of the record and the case as presented by the plaintiffs in error to see how the judgment can be sustained.

The plaintiff below, the defendant in error here, secured a judgment for $131.25 against the defendants below, the plaintiffs in error here. It was for a brokerage fee for the sale of real estate. Lucas was a member of a firm called Eckhart & Lucas, which had a real estate broker's license. Apart from the very doubtful question, at least, whether, when the point is made as it is here, a license to a partnership, consisting of the defendant in error and another person, would enable the defendant in error to do business and collect fees as a real estate broker individually, - it appears from the evidence that the negotiations in which the fees were alleged to be earned were carried on by Lucas for the benefit of the firm. Perhaps something different might have appeared on a further investigation, but the Court below seemed to regard as a negligible "technicality" the position that the suit was not brought by the partners jointly, and discouraged such investigation. However that may be, the testimony of Eckhardt for the plaintiff is

clear and emphatic that it is a claim of the firm for which the judgment was given. We cannot hold this a technicality. It makes the judgment erroneous.

Dement v. Rokker, 126 Ill. 174.

The judgment is reversed and the cause is remanded to the Municipal Court of Chicago.

REVERSED AND REMANDED.

Mon Term 1914

291 - 20222

JANE E. F. CROWTHER,
Defendant in Error,

vs.

ELLEN R. BELL and RUTH J. MAURER,
Plaintiffs in Error.

ERROR TO THE MUNICIPAL COURT OF CHICAGO.

190 I.A. 48

MR. PRESIDING JUSTICE BROWN

DELIVERED THE OPINION OF THE COURT.

This writ of error is brought to reverse a judgment of the Municipal Court for $515, rendered against the plaintiffs in error here, defendants below, and in favor of the defendant in error here, plaintiff below, on the following written instrument:

"August 4th, 1908.
For 80 shares of stock in the Marinello System I promise to pay to Jean E. F. Crowther $1000, $500 now and commencing in November, 1908, $25 a month until paid.
Ellen R. Bell,
Ruth J. Maurer."

We fail to see any reason for disturbing this judgment or indeed that there was any substantial defense made to the action on this instrument.

The plaintiffs in error maintain that "the instrument does not meet the requirements of the Negotiable Instruments Act for want of certainty of time" of payment. If true, this is of no importance in this suit. The suit does not depend on the instrument sued on being "negotiable" or "negotiated." It is in the hands of the original payee and holder and is a promise to pay money. The whole amount unpaid is and was, when the suit was brought, January 23, 1913, overdue.

The defenses put forward - that there was no consideration for the note, and that if there were it had

failed - would be good if made out; but they were not made out, nor is there any evidence materially tending to support them.

"The Marinello System" is the name of a corporation. Its business does not appear in the evidence, but it does clearly appear that whatever it was, Mrs. Bell, one of the defendants, as well as Mrs. Crowther, the plaintiff, was engaged in it and one of those conducting it. They came to an agreement about the value of stock which Mrs. Crowther held, and Mrs. Crowther sold it to Mrs. Bell and received the instrument sued on in return, Mrs. Maurer signing it, as is alleged, for the accommodation of Mrs. Bell. This makes a good consideration for the note and prevents either party defendant from successfully setting up a want of such consideration.

That the stock was really not as valuable then as they thought it, or even that it was in reality intrinsically worth nothing, would not, in the absence of any evidence or suggestion of fraud, be material. Still less would it be of consequence as affecting consideration that the stock thereafter became of small or no value.

Nor is better taken the position of the defendants, that the consideration had partially at least failed because the certificates of stock were not delivered before this suit was brought. Apart from the fact that the evidence would seem to indicate that by agreement the certificates were to be held as security for the unpaid portion of the note and that the proportion agreed on has been released so far as payment has been made, and that all the remainder of the certificates were ready for delivery when the entire sum was paid, - it is true that certificates of stock are

but evidence of its ownership. If the transaction was, as we think it was, an absolute sale of the 80 shares, the ownership of the stock was from August 4, 1908, in Mrs. Bell. But even if it be considered to involve an immediate change of title of 40 shares only, and an executory contract to sell and deliver 40 shares more in the future, on payment, the consideration was equally good.

And in either case the stock will become the absolute property of Mrs. Bell on payment.

That Mrs. Maurer was an accommodation maker, of course does not release her from liability. There would be no "accommodation" in becoming a joint maker if consideration running to an accommodation signer was necessary to render one liable.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Mor. Term 1914
302 - 20234

BERKSHIRE WAREHOUSE COMPANY,
a corporation,
Appellee,

vs.

HILGER & COMPANY, a corporation,
et al.
On Appeal of EDWARD HINES LUMBER
COMPANY, Appellant.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

190 I.A. 49

MR. PRESIDING JUSTICE BROWN
DELIVERED THE OPINION OF THE COURT.

This appeal is taken in the above entitled cause by the appellant, the Edward Hines Lumber Company, from a decree of the Superior Court of Cook County, Illinois, denying appellant a mechanic's lien on the property on the Berkshire Warehouse Company located in Chicago at 45th Place and Jackson avenue, and dismissing the intervening petition of said appellant for want of equity.

The question raised by the action of the Court below and by the appeal is one of law, the parties being in agreement on the facts or precluded by unattacked findings of the Master and of the Court from contesting the following statement of them:

In July, 1909, the Berkshire Warehouse Company made a contract with Hilger & Company, general contractors, by the terms of which Hilger & Company were to construct for $75,000 certain improvements on premises owned by the Berkshire Warehouse Company. July 8, 1909, Hilger & Co. began work on the building. August 9, 1909, without requiring any statement such as is provided for in Section 5 of the Mechanic's Lien Act of 1903, the Berkshire Warehouse Company paid Hilger & Co. $25[illegible] on their contract. August 16, 1909, as found by the Master and Court, Hilger &

Company made a contract with the appellant, the Edward Hines Lumber Company, to deliver lumber and building materials to the premises before described for the use of said Hilger & Company under its contract with the Berkshire Warehouse Company from time to time as the same should be required.

The appellee undertakes to question the accuracy of this finding in its argument herein, but for the reason before indicated, that the findings of the Master and Court to this effect were unattacked below or in the assignments of error here, we must assume its truth.

August 20, 1909, the Berkshire Warehouse Company paid Hilger & Company $2500 more, and September 4, 1909, $5000 - in each case without requiring a statement from them.

September 28, 1909, however, Hilger & Co. made a statement sufficient, under Section 5 of the Lien Act. It did not contain the name of the appellant as a party "furnishing material or labor" nor "the amount due or to become due" to the appellant. There was at that time nothing due to the appellant, and it could not have been told what, if anything, would become due to it, for although, as we have said, the appellee is not in a position to deny that a contract was entered into in August, 1909, between Hilger & Company and the Edward Hines Lumber Company, the evidence preserved shows that this contract was not for a specific amount of lumber or building material at a specified price, but was, as the Master found, to deliver them "from time to time as the same should be required." Nothing up to September 28, 1909, had been delivered. Other payments were thereafter made to Hilger & Company by the Berkshire Warehouse Company, before November 10, 1909, when the first delivery of the lumber furnished Hilger & Company by the appellant for the building here involved was made.

The Master finds - and there is nothing in the praecipe record filed herein to contradict it nor is it contested - that most of the materials delivered under the contract of the Edward Hines Lumber Company were delivered before November 16, 1909. They therefore must have been so delivered in the week between November 10th and November 16th.

November 16, 1909, the Berkshire Warehouse Company required and received a statement from Wilger & Company, sworn to by E. H. Wilger, the President of the contracting Company, fulfilling the requirements of the statute. It stated that the contractor had contracted with various persons, naming them, for labor and materials for the construction of the building in question, and described the character of the labor and materials contracted for respectively from each one and the amount to become due for them (naming, for example, Marsh & Bingham as having a contract for lumber for $6019.33). It stated that there were no other accounts contracted for or due or to become due for material or labor on said building than those named, and that all material was then on the premises to complete the work except those in the subcontracts thus indicated. The statement did not contain the name of the Edward Hines Lumber Company, nor mention any contract or any amount due or to become due to said Company. The statement showed a schedule of $23,874.08 due and to become due to complete the work for material and labor. At the time of the taking of this statement the Berkshire Warehouse Company had more than sufficient money in its hands to pay the amounts due and to become due the subcontracters whose names appeared in the statement, and for the labor that was said to be necessary to complete the work; and on November 18, 1909, it paid

Hilger & Company $16,000, and on December 1, 1909, $10,000. December 4, 1909, the Edward Hines Lumber Company made its last delivery of lumber and building materials at the premises in question and thus completed the delivery of lumber and building materials,as the Master finds, which were used in the construction of said building, to the value and amount of $857.59.

December 20, 1909, Hilger & Company as a corporation stopped work on the building, but the work was continued by the workmen who had been employed on it under the joint superintendency of the Berkshire Warehouse Company and the former superintendent for Hilger & Company, and thereafter payrolls were made up weekly and the labor employed upon the work was paid directly by the Berkshire Warehouse Company.

January 20, 1910, a notice was served by the Edward Hines Lumber Company on the Berkshire Warehouse Company and its architect or superintendent, that it, the Edward Hines Lumber Company, had been employed by Hilger & Company to furnish lumber, under its contract with the Warehouse Company on the property in question, describing it, and that there was due to it, the Edward Hines Lumber Company, on the fourth day of December, 1909, the sum of $857.57, and that the Lumber Company would hold the building and the interest of the persons notified in the ground, liable for this amount. This was the proper form of notice under Section 24 of the Lien Act. The Act says that such a notice may be given at any time after the subcontractor or party furnishing labor or materials has made his contract, and shall be given within 60 days after the completion thereof. February 5, 1910, the work was abandoned.

February 10, 1910, the Sykes Steel Roofing Company, claiming to be one of the subcontractors of said Hilger &

Company commenced a suit at law against the Berkshire Warehouse Company and Milger & Company to recover a sum alleged to be due to it for materials furnished in connection with said contract, and other mechanic lien notices were served at about this time on the Berkshire Warehouse Company, and on February 23, 191 , that Company filed its bill of complaint in the Superior Court, making all the notifying and claiming parties, parties defendant and asking that the said defendants be required to set forth their respective claims and that the Court should ascertain the amount, if any, due from said complainant to Milger & Company and the amount due to each of the defendants having liens, and that in case the amount found due to Milger & Company should be insufficient to discharge all of the liens, that such amount should be divided among the defendants entitled to the liens pro rata, and that all of the defendants who should fail to prove and establish their liens upon the premises should be foreclosed.

March 19, 1910, the Edward Hines Lumber Company filed an intervening petition or answer asserting its right to a lien on the premises to the amount of $837.59, due, it alleged, on December 4, 1909.

March 21, 1910, the Berkshire Warehouse Company entered into a contract with one Louis Mies to complete the building for $6850, and said Mies did so complete the building May 1, 1910.

Hearings were had on the bill and the numerous answers or intervening petitions, of which answers or petitions there were thirty, each setting forth a claim for a separate and specific lien, and on September 12, 1913, the report of the Master in Chancery to whom the cause had been referred was filed, in which report he dealt with each of

said claims. He found that at the time of filing the bill there remained in the hands of the complainant, the Berkshire Warehouse Company, $10,425.55 "from the funds of said building", "after allowing to complainant credit for all of the payments" and crediting Hilger & Company with extras to which they were entitled, and that including extras Kies had been properly paid all of this but $3575.55 for the completion of the building in accordance with the contract originally entered into by said Hilger & Company. It found that -

"The contractor's statement taken on November 16, 1909, was in substantial compliance with the statute in such case made and provided. Under this statement the contractors therein named were protected to the amount of their contracts as therein set forth, and it was not necessary for them to serve any subcontractors' notice upon the said complainant to protect their liens to the respective amounts set forth in said contractor's statement. * * * * * * * It thereupon became and was the duty of the complainant to retain in its hands sufficient funds to pay the various amounts due the various subcontractors as set forth in said statement. In spite of this obligation the said complainant paid to said Hilger & Company the sum of Sixteen Thousand Dollars on November 18, 1909, and the further sum of Ten Thousand Dollars for extra work upon the verbal authority of the architect, so that for the purpose of this proceeding said complainant must be considered to have in its hands sufficient funds to pay all of the subcontractors of whose contracts it had notice by said contractor's statement and affidavit of November 16, 1909, and also those whose contracts were for extra work or material furnished after November 16, 1909.

As to the intervening petition of the Edward Kines Lumber Company, the findings of the Master were:

"That on or about the 15th day of August, 1909, said Hilger and Company applied to said petitioner and thereupon said petitioner entered into a contract with said Hilger & Company to deliver lumber and building materials to the premises hereinbefore described for the use of said Hilger & Company under its said contract with the complainant herein from time to time as the same shall be required by said Hilger & Company under its said contract. That subsequently and from time to time during its said contract said Hilger & Company ordered various lumber and building materials, which were subsequently delivered to said premises by said petitioner, the first of such deliveries being made on or about the 10th day of November, 1909, and the last of said deliveries being made on the 4th day of December, 1909, during which time said petitioner delivered to the premises in question lumber and building material which were thereafter used in the construction of said building in the amount of eight hundred fifty-seven and 59/100 ($857.59) dollars. That on January 2[illegible], 1910, said petitioner caused to be served upon complainant its sub-

contractor's notice for lien, wherein it notified said complainant that there was due it under said contract with Hilger & Co. on December 4, 1910, the said sum of eight hundred fifty-seven 59/100 Dollars, for which amount it would hold the building and interest of said complainant in the grounds liable. That the contractor's statement of November 16, 1909, makes no reference to the contract made by said Hilger & Co. with said petitioner.

The Edward Hines Lumber Company claims a balance as hereinbefore set forth for lumber and building materials delivered and used in the construction of said building of eight hundred fifty-seven and 59/100 Dollars, - * * * *

The name of said contractor does not appear in the contractor's statement of November 16,1909,and I find, as hereinbefore stated, that the complainant is protected thereby from such claim, it appearing that subcontractor's contract was made and most of the materials delivered thereunder prior to the said 16th day of November, 1909.

Objections, ordered thereafter to stand as exceptions, were taken by the Edward Hines Lumber Company to the findings of the Master so far as they related to its claim; but on hearing the Court overruled all the exceptions filed to the report by any of the parties to the cause and confirmed the report.

The decree entered January 28, 1914, repeated all the findings of the Master before stated and found:

"That the intervening petitioner, Edward Hines Lumber Company, is not entitled to a mechanic's lien upon the premises heretofore described by reason of the fact that said Edward Hines Lumber Company does not appear in the contractor's statement of November 16, 1909, and that the said intervening petition of said Edward Hines Lumber Company should be dismissed for want of equity."

With other intervening petitions, the petition of the Edward Hines Lumber Company was accordingly dismissed for want of equity by the ordering part of the decree. To reverse this action the Edward Hines Lumber Company has appealed to this Court,contending that the three payments of August 9,1909,August 20,1909,and September 4,1909,aggregating $10,000,having been made by the Berkshire Warehouse Co. to Hilger & Co.,without requiring any sworn statement from Hilger & Co.,were wrongful and unlawful as against the Edward Hines Lumber Co. (so declared to be by Section 32 of the Lien Act), and that as the Court found that the contract of the Edward Hines Lumber Company was

made on or about August 16, 1909, the Edward Hines Lumber Company had an interest in the building from that date, and neither the taking of a statement on November 16, 1909, after ten thousand dollars had been wrongfully paid, nor the contents of that statement could affect its interest in any way so far as that ten thousand dollars is concerned. Therefore, it maintains, it is entitled to a mechanic's lien for the full amount of its claim, which does not amount to a tenth of that sum.

It is very difficult if not impossible to extract a consistent or logical theory of the respective rights, duties, obligations and liabilities of owners, contractors and subcontractors out of the Mechanic's Lien Act of 1903, made up as it is of altered, amended, enlarged and elaborated provisions of various prior statutes connected rather by mere conjunction than by a systematically developed plan based either on justice or expediency. But certain things in the construction of the Act have been settled through litigation which has reached the Supreme Court. One is that under Section 27 of the Act a subcontractor whose name is omitted from a statement by the original contractor, such as is required by Section 3, even though that statement is false and defective because of such omission, cannot enforce a claim for a lien against an innocent owner who has not in his hands due or to become due the original contractor sufficient money to satisfy both such claim and all the claims which have not been so omitted from the contractor's statement, unless he can show that before the payments to the contractor or sub-contractors named in the scheduled statement, which have caused the deficiency, he has served such a notice on the owner as is provided for by Sec. 24 of the Act. This is such a notice as the Edward Hines Lumber Company served on the owner in this case on January 20, 1910. But it was then

too late. Relying on the false and defective statement of November 16, 19[illegible]9, the Berkshire Warehouse Company had on November 18 and December 1, 19[illegible]9, depleted the funds in its hands applicable to the building by payments to the original contractor, but it did not, after January 2[illegible], 191[illegible], pay out any money which was "due or to become due" to the contractor. It clearly appears that when it filed this bill, and still more decisively when the decree was entered, it was without sufficient money to pay those subcontractors who could enforce liens by virtue of having been named in the statement or of having given notices as required.

We think that if the exact case herein presented is not decided by the opinion in the Knickerbocker Ice Company v. Halsey Bros. Company, 262 Ill., 241, it is a legitimate inference from said opinion that the <u>last</u> statement under Section 5 may be relied on by the owner, although it takes away all protection of the lien law from the subcontractors not fortunate enough to have been named in it.

"In order", the opinion says, "to be apprised of the exact situation <u>at the time any payment is demanded by and made to the contractor</u>, whether it be the first payment made under the contract or any subsequent payment, the owner is entitled under said Section 5 to require, and it is the duty of the contractor to make, a statement showing the situation <u>as it then exists</u>. * * * In this case the subcontractor refrained from serving notice upon the owner and thereby elected to abide by the sworn statements made by the contractor. * * having no knowledge of the falsity of the statements, the owner had the right to act upon them and the subcontractor must look to the contractor for any balance due on its claim over and above the amount withheld by the owner pursuant to the sworn statement made."

Most of the material furnished by the Edward Hines Lumber Company the Master finds was delivered before November 16th. Had the Lumber Company given notice or notice to the owner when it began and as it continued its deliveries, it would have been protected to the amounts named, as against the payments to the contractor made November 16th and December

1st. Of course had it any possible means of ascertaining under the "contract" the Master and Chancellor found existed, the necessary data for the notice - which, however, we cannot from the evidence suppose it had - it could have given the notice as early as August 16, 1909, and protected itself also against the payments made to the contractor on August 26th and September 4th, 1909, and subsequently. But unless it was possible thus to forecast the orders in the future (which do not seem by the evidence to have been given except substantially contemporaneously with the delivery), we do not see how any further protection could have been obtained under the Act for the material delivered on December 4, 1909, or on any day subsequent to December 1, 1909.

If the result reached seems unsatisfactory as a matter of logical reasoning, the fault, if fault there be, is in the provisions of the Act which we are called on to construe. We can arrive at no better conclusion than did the Master and Chancellor below, and the order dismissing the appellant's intervening petition is affirmed.

AFFIRMED.

Mem. Term 1914

434 - 19769

PATRICK J. McDERMOTT, Administrator of the Estate of PATRICK FINNERTY, deceased,

Plaintiff in Error,

vs.

JOHN GRIFFITHS and GEORGE W. GRIFFITHS, partners, doing business as JOHN GRIFFITHS & SON,

Defendants in Error.

ERROR TO CIRCUIT COURT OF COOK COUNTY.

190 I.A. 53

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This writ of error brings in review a judgment of nil capiat entered on a verdict of not guilty returned in an action for wrongfully causing the death of Patrick Finnerty, plaintiff's intestate. Finnerty was a well digger employed by defendants, who were putting in the foundation for a large building in Chicago. A part of the work consisted in digging "wells" down to the rock, a depth of about 100 feet. These wells were filled with concrete and on such concrete "legs" the building rested. The men worked in three shifts, the day shift 8 to 4, the night 4 to 12 and 12 to 8. Deceased belonged to the day shift. Thursday he was digging in well 114, which was then about 80 feet deep. Cameron was the superintendent, Conway the assistant day foreman under Cameron, Fassett night superintendent and Claypool night foreman. Each digger had a niggerhead man and a dumper. Finnerty's niggerhead man was Conroy and Walsh was his dumper. The foremen worked in 12 hour shifts from about 8 A. M. and 8 P. M. Gas was discovered in well 114 Thursday night some hours after Finnerty had quit work, and efforts were made to burn it out. These efforts were unsuccessful and the well was then "shut down" by covering it with leg-

ging.

A digger used in his work a foot-iron which was fastened to his shoe. Such iron was the private property of the digger and was generally, but not always, left in the well when the digger quit work for the day. Finnerty when he quit work left his foot-iron in the well hanging to a nail. The following morning Finnerty and Conroy went to well 114 but did not go to work. Foreman Conway ordered them to work in another well, which was about [illegible] feet deep, and they went to work in that well and worked perhaps fifteen minutes. Finnerty then came up and he, Conroy and Walsh went to the well where they had worked the day before. They went back to the well they had just left, got a bucket and took it to well 114 and hooked it to the niggerhead, by which the bucket could be either lowered or raised. Finnerty got in the bucket and it was lowered into the well 40 or 50 feet, when Finnerty called out, "Take me up." From the evidence the jury might properly find that before the niggerhead could be reversed so as to raise the bucket, Finnerty fell from the bucket to the bottom of the well, where he was found half an hour later dead. Claypool, the night foreman, was told by the digger in 114 about midnight that the air was bad and he could not stand it, and Claypool told him to come out. He did so, and from that time no work was done in the well. Four wells were shut down about the same time and an unsuccessful effort was made to turn out the gas in 114; still later, about 4 A. M., Claypool covered it with lagging. He testified that just before 8 A.M. he saw Finnerty over the well and told him not to go down in the well, that it was shut down. A little later foreman Conway told Finnerty to go to work in another well. Conway testified that nobody said

anything to him about danger from gas in well 114. Although foreman Conway may not have known that there was gas or danger of gas in 114, superintendent Cameron knew that gas had been found in that well. He testified that foreman Claypool told him Friday morning that gas had been encountered in 114 and that he had tried to burn it out but could not do so. The knowledge of superintendent Cameron that gas had been found in well 114 was knowledge of that fact by the defendants, and no one told Finnerty or either of the men who worked with him that gas had been found in 114. Walsh testified that when he, Finnery and Conway went from the shallow well, where they had worked fifteen minutes, to well 114, they brushed past Conway; that when they went back to the shallow well for a bucket and took it to 114 they again brushed past Conway, who stood 12 or 15 feet from well 114; and further testified that Conway saw Finnerty start down into 114. Conway testified that he did not see Finnerty go down into well 114, and when asked whether he saw Finnerty, Conroy and Walsh at the top of 114, after he sent Finnerty to work at the shallow well, answered: "I don't remember if I did."

Complaint is made by plaintiff in error of the giving of instructions 3 and 6 for the defendant, which are as follows:

"3. The fact that Finnerty received the fatal injuries while employed by John Griffiths & Son, does not of itself indicate that the plaintiff is entitled to recover in this case. An employer is not an insurer of the safety of his employes, and the fact standing alone that an accident occurs to an employe, does not show whether or not the employer has violated any duty which he owes to his employe.

"The law imposes upon an employer only the duty to use reasonable care to furnish a reasonably safe place and reasonably safe appliances for the work to be done under the circumstances of the particular employment, and if the evidence shows that the employer has used such care and that such care was exercised down to a reasonable time before the occurrence of Finnerty's death, there can be no recovery against the employer.

"If you believe from the evidence in this case that John Griffiths & Son used such a degree of care as a reasonably prudent person engaged in the same or similar work would have used in view of all the circumstances shown by the evidence, and that such degree of care continued down to a reasonable time before the happening of the accident to Finnerty, then the plaintiff cannot recover in this case and your verdict should be for the defendants."

"6. If you believe from the evidence in this case that Finnerty was ordered to work in another well and that thereafter of his own volition he returned to well 114 for any purpose and went down to said well 114 without any orders so to do and sustained fatal injuries while in said well, you are instructed while in said well he was a volunteer or at most a mere licensee and that there was no duty upon defendants after ordering him to work at the other well, than to refrain from wilfully and wantonly injuring him."

The duty of defendant to exercise reasonable care continued down to the death of Finnerty. In passing on the question whether the defendants were guilty of negligence, the jury might properly consider all the circumstances attending the accident and in that connection the acts and conduct of the defendants prior to such death, but the verdict could only properly turn on the question whether the defendants were guilty of negligence which caused or contributed to Finnerty's death. If the defendants were guilty of such negligence, the plaintiff was entitled to a verdict, although up to within a reasonable time before the accident the defendants had exercised reasonable care for Finnerty's safety. What is reasonable care in a particular case depends on the circumstances of the case and is peculiarly a question of fact for the jury and not one of law for the court; but by the terms of the instruction in question the Court instructed the jury, in effect, that if they found that the defendants exercised reasonable care down to a reasonable time before Finnerty's death, they might therefrom find that defendants were not guilty of negligence. For the reasons indicated we think the Court erred in giving instruction 3.

There was evidence that Finnerty was in the habit of leaving his foot-iron in the well where he worked

when he quit work for the day, and that other well diggers left their foot-irons in the wells, while some others took such irons with them when they left the well.

The view most favorable to the right of recovery that can be taken of Finnerty's conduct, is that he returned to well 114 and went down into it to get his foot-iron. It is undisputed that he had been ordered to go to another well to work and that he returned to and went down into 114 without orders to do so, and thereby came to his death. By instruction 6 the jury was told that if they found the facts as above stated, then Finnerty was a mere volunteer or licensee, to whom defendants owed no duty except to refrain from wilfully or wantonly injuring him. This was, in effect, on the evidence in this record, an instruction to find the defendants not guilty. The Court should have submitted to the jury the question whether he went down into well 114 to get his foot-iron, and also the question, if they found that he did go down into the well for that purpose, whether in doing so he was reasonably within the scope of his employment.

Walbert v. Trexler, 156 Pa. S., 112.

But by the instruction in question the Court, instead of submitting those questions to the jury as questions of fact to be determined from all the evidence, in effect decided both as matters of law.

For the giving of said instructions the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Mem Term 1914
74 - 19906

JOHN M. GIBBONS,
Defendant in Error,

vs.

JOHN F. JURGENSEN and
FREDERICKA JURGENSEN,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

190 I.A. 55

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff, a real estate broker, recovered a judgment against defendants for $337.50 for commissions for finding a purchaser for certain real estate of which the defendant Fredericka Jurgensen, the wife of the other defendant, was the owner. The negotiations which resulted in the employment of the plaintiff were conducted by John F. Jurgensen, but it appears from the evidence that such employment was made with the knowledge and consent of his wife. Gibbons introduced Bruygom to John F. Jurgensen, who fixed the price of the real estate at $13,750, and listed the same for sale with Gibbons. A few weeks later the property was conveyed by the Jurgensens to Bassett. The money, $13,500, which was paid for the property was furnished by Bruygom.

We think that from the evidence the Court might properly find that the purchase, though nominally made by Bassett, was in fact made by Bruygom and that Bassett's name was used in the manner it was for the purpose of making the transaction appear as a sale to Bassett with intent to defeat the just claim of Gibbons for commissions. We think that the conclusion reached by the Court was proper on the evidence, and the judgment is affirmed.

AFFIRMED.

Oct Term 1913

582 - 19987

JOHN D. CASEY, as Administrator of the Estate of SOLOMON MORRIS, deceased, Appellee,	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
vs.	
CHICAGO RAILWAYS COMPANY, Appellant.	

190 I.A. 56

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This appeal brings in review a judgment recovered by Casey as administrator of Solomon Morris against the Chicago Railways Company for wrongfully causing the death of plaintiff's intestate, a boy eight years and eleven months of age. Twelfth street is a broad east and west street between Wood and Lincoln streets, with a parkway in the center of the street, a roadway on each side of the parkway and a street railway track in each roadway, over which the defendant Company operated its electric street cars. Washburne avenue is the next street south of Twelfth street, and the Morris family lived in that avenue near the corner of Wood street. Wood and Lincoln are north and south streets and Lincoln is the next street west of Wood. Decedent was last seen alive a little before nine o'clock at the southeast corner of Twelfth and Wood streets. He left home a little before eight o'clock with his sister Sarah, who also had with her a baby. At Twelfth and Wood streets he met some little boys and stopped to play tag with them, and was playing with them at eight thirty when his sister returned home with the baby.

Defendant's car 4297 was operated that night by motorman Murley and passed Wood street in the north, the west bound, track about nine forty P. M. The body of decedent was not discovered until about eleven o'clock that night. Plaintiff

called as witnesses Shurley, the motorman of car 4297, Schultz, the night foreman of defendant at the Lawndale station, motorman McKenna, who first saw what proved to be the body of decedent on the west bound track just east of Lincoln street at about eleven P. M., Bartfield, who saw a part of decedent's body on the track, Police officer Quinlan, who removed the body, and other motormen and conductors of the defendant Company, and put in evidence trip sheets and time cards. Defendant called as witnesses Lewis, its repair foreman and inspector at the Lawndale station, who not long after midnight examined the cars that ran that night on Twelfth street, who testified that he found marks of blood on car 4297 on the side truck fender and on the side of the brake shoe, conductor Hurley of 4297, and a photographer.

From the evidence in the record the jury might, we think, properly find that decedent came to his death by being struck and run over by car 4297. The motorman testified that he did not see any one on the track, that he did not know that his car struck any one; and he and his conductor each testified that he noticed nothing unusual in the movement or operation of the car. The car was detained at the bridge about two miles east of Wood street thirty or forty minutes.

Whether, if the motorman had been operating his car with reasonable care and caution, he would have seen decedent on or so near the track as to be in danger of being struck by the car, in time to stop the car and avoid injuring him, was, we think, a question of fact for the jury, upon which their verdict must be held conclusive. And we also think that whether the decedent was in the exercise of ordinary care for his own safety and whether the parents of decedent exercised care for his safety, were questions of fact upon which the verdict should not be disturbed.

We find no errors in procedure of sufficient importance to justify or require the reversal of the judgment, and it is affirmed.

JUDGMENT AFFIRMED.

Near Term 1914

254 - 20184

ANGELO B. PIROLA,
Plaintiff in Error,

vs.

EDWARD FLADMARK,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

190 I.A. 57

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Plaintiff plastered a certain building for defendant at the agreed price of $1828. After the work had been completed plaintiff claimed $116 for extras. The only testimony in the case was that of the plaintiff and the defendant, and that is conflicting both as to the original agreement and as to an alleged subsequent promise by the defendant to pay plaintiff's claim for extras. September 12, 1910, exclusive of the claim for extras, there was due plaintiff $200. Defendant on that day mailed a check to plaintiff for that sum, on the face of which was written the words: "Final payment for plastering at the north-west corner of Magnolia and Rosedale Ave." By the advice of his lawyer plaintiff wrote defendant that he would not deposit the check but would hold the same until the 16th inst., and if he did not hear from defendant to the contrary he would give the credit mentioned, retain the check and assume that defendant agreed to this. Defendant testified that he did not receive the letter, and the plaintiff, September 16, deposited the check.

The question whether there was a bona fide dispute between the parties as to the amount due, was a question of fact for the Court, on which its finding must, on the evi-

dence in the record, be held conclusive.

Teague et al. v. Burns Lumber Co., No.19283, not yet reported.

If there was a bona fide dispute, then the retention and cashing of the check, under the circumstances above stated, amounted to an award and satisfaction.

Teague et al. v. Burns Lumber Co., supra, and cases there cited.

The judgment is affirmed.

AFFIRMED.

New Term 1914

419 - 20359

JOHN SZREMBA, a minor, by Helen Szremba, his next friend,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

190 I.A. 58

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

Milwaukee and Chicago avenues are two of the principal avenues in Chicago, and the accident in this case occurred at the diagonal intersection of these avenues. A large electric truck was passing east in the south street car track in Chicago avenue across the Milwaukee avenue tracks of the defendant company, which ran northwest and southeast. When the truck was crossing the Milwaukee avenue tracks, the plaintiff was on the rear end of the truck lying on the bed of the truck on his belly with his feet hanging over the end of the bed. The evidence was conflicting as to where the truck was when plaintiff got on it, but we cannot say that the jury might not properly find from the evidence that he got on the truck when it was some distance west of the Milwaukee avenue tracks. The street car stopped on the north side of Chicago avenue to take on and discharge passengers, and it started to cross Chicago avenue as the truck was crossing the track on which the car ran. There is no evidence that the motorman did not have complete control of the car or that it was running at an excessive or improper rate of speed under the circumstances shown by the evidence. As the car approached the track on which the truck ran, and when it was but a few feet from it, the truck sud-

denly stopped and the buttocks of the plaintiff were squeezed between the car and the rear end of the bed of the truck. The truck was compelled to stop by a horse and wagon going northwest in Milwaukee avenue directly in front of the truck. The motorman had no reason to anticipate that the truck instead of proceeding would stop, and it was this sudden and unexpected stopping of the truck that caused the accident. If the truck had continued in its course it no doubt would have cleared the truck on which the car ran by a distance sufficient to prevent the car from injuring the plaintiff. The sudden stopping of the truck so near to the track on which the car was approaching as to endanger the safety of a person in the position the plaintiff was in on the truck, was such an unexpected, unusual and extraordinary occurrence that the law did not require the motorman to anticipate it. We think that the evidence shows that the accident occurred without the fault or negligence of the servant of the defendant in charge and control of the car, and is not therefore sufficient to justify or support a recovery of damages by the plaintiff for the injuries resulting from the accident, and the judgment is therefore reversed.

JUDGMENT REVERSED.

419 - 20359 FINDING OF FACT.

The Court in this case finds as a fact from the evidence in the record that the defendant was not guilty of any negligence which caused or contributed to the injury of the plaintiff for which he recovered in this case.

Mar. Term 1914
4 - 18553

JOSEPH REEDER,
Defendant in Error,

vs.

THE WEST SIDE TRUST & SAVINGS BANK,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

190 I.A. 59

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit and had judgment for money which he claimed to have deposited with the defendant bank for which he had not received credit. He claims that on February 5, 1912, he deposited $158.50 but received credit for only $128.50; the difference of $30 is the amount in dispute.

We are of the opinion that the finding of the court is manifestly against the weight of the evidence.

Plaintiff testified that he deposited $158.50, a portion of which was in currency. He produced as exhibits his passbook, showing an entry for that amount, the deposit slip, and a letter from the bank notifying him of an error made in adding the items on the deposit slip. The receiving teller of defendant testified to the discovery in the evening of the day of the deposit of a discrepancy between the debits and credits of $30. He produced his trial balance sheet showing this. He told of his checking up the deposit slips of the day in seeking to locate the error, and of his discovery of a mistake in the addition of two items on plaintiff's deposit slip. As it appears on the face of this slip, the error seems to be in adding the amount of $57.00 to $71.50 and making a total of $158.50. The teller testified to his crossing out the figures $158.50 and writing just below on the slip the correct amount of $128.50.

The particular point of controversy upon the trial was as to the authorship of the figure 5 in the item of $57. The figures on the slip are in the handwriting of the plaintiff, except the correction made by the teller, and we must also except this figure 5 if we accept the theory of plaintiff, who testified that this figure was not in his handwriting and would seem to wish to have it believed that he had originally written the figure 8 in this space. If the item was $87 instead of $57 then the addition made by him was correct. An expert testified for the defendant that the figure 8 had never been written in this space but that the figure 1 had been and partially erased, and the figure 5 written over it. The trial court, however, from his inspection of the exhibited deposit slip was of the opinion, as he stated, that the figure 8 had originally been written in this space but had been erased and the figure 5 written therein, and furthermore that this figure 5 was written by the same person who wrote the figures of the corrected addition, that is, the teller. This court has carefully inspected the exhibit which was before the trial court, and we cannot agree with either of these conclusions. Indeed, there appear good grounds for believing that the figure 5 in question was made by the same person who made the other figures on the slip, excluding those admittedly made by the teller. However this may be, we hold there should be a new trial for the reason heretofore stated, and the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Term 1913 -

86 - 19468

THE GLOBE ASSOCIATION, a corporation, Plaintiff in Error, vs. FANNIE F. BREGA, Defendant in Error.	)	Error to Municipal Court of Chicago.

190 I.A. 60

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff was lessee under a written lease from defendant of a certain building. The lease provided among other things that the lessor should furnish "steam heat when necessary, from October 1 to April 30, for ten hours per diem." Plaintiff claimed that defendant failed and refused to furnish heat and that plaintiff was compelled to heat the premises at its own expense. This suit is to recover from defendant the amount said to be expended for this purpose.

Upon the trial the court sustained objections to questions directed towards the fact of the alleged failure to heat the premises, the court apparently being of the opinion that so long as the plaintiff remained in the premises and paid rent it could not recover for breach of the lessor's covenant. This is not the law. If the lessor failed to furnish heat the tenant might recoup the cost from the rent or sue upon the covenant. Wood's Landlord & Tenant, sec. 380; Wright v. Lattin, 33 Ill. 293; Rubens v. Hill. 213 Ill. 523. Plaintiff was entitled to prove, if it could, that defendant failed to furnish heat, and testimony as to temperatures was admissible.

Because of the errors indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Oct. Term 1913

322 - 19721

VANDERPLOEG & KUIPER and A. U. THOMPSON, Defendants in Error, vs. IVOR PETERSON (Defendant), G. A. SELVEN, Garnishee and Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

190 I.A. 61

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit in attachment against Ivor Peterson, and the attachment writ was served on G. A. Selven as garnishee on June 12, 1913. Subsequently the court found that Selven was indebted to Peterson in the sum of $32.08 and judgment against the garnishee was entered.

The evidence shows that in February, 1913, Selven made a contract with Peterson for the painting of Selven's building. Various payments to Peterson were made and the last payment, which was for $110, was made on July 9th. The justification for this payment after the service of the attachment writ is claimed to lie in the alleged fact that prior to this service of the writ Peterson had made what is called an equitable assignment of any amount due him on the contract to the parties furnishing material used in the work. The only evidence suggested as tending to support this claim of an equitable assignment is the testimony of Selven concerning a conversation between him and one of the firm of Johnson Brothers, who supplied materials, in which Johnson told Selven, "I got to see if the material be paid," which Selven understood to mean that he, Johnson, was holding him

for the money. This indefinite statement is of no importance, and certainly falls far short of anything that might be called an assignment by Peterson. Furthermore, we infer from the evidence this conversation took place at a time when the statutory period within which Johnson should file his written notice on the owner of his claim for materials had already lapsed, and therefore even a written notice would not have protected Selven in paying Peterson or Johnson after the service of the attachment writ.

The court was right in finding that Selven on June 18th was indebted to Peterson, and the judgment followed properly and is affirmed.

AFFIRMED.

Oct. Term 1913
398 - 19800

BERNEY B. BORG, for use of
OTTO MILLER,
Appellant,

vs.

KAWIN & COMPANY, a corporation,
Garnishee, WALTER J. MILLER,
Intervening Petitioner,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

190 I.A. 62

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Otto Miller, appellant, brought a garnishment suit on a judgment had by him against Berney B. Borg; summons was served on Kawin & Company as garnishee. The garnishee was indebted to Borg in the sum of $1,100, which was the amount of the verdict in a suit brought by Borg against Kawin & Company, in which Borg was represented by Walter Miller, an attorney. Walter Miller filed an intervening petition in this garnishment proceeding, claiming a lien on the amount recovered because of a contract between him and Borg whereby Borg had agreed to pay him for his services one-sixth of the amount realized. A copy of the contract with a notice of Walter Miller's claim for an attorney's lien was served on Kawin & Company in pursuance of the statute granting attorneys a lien for services (chap. 32, sec. 55, Hurd's Illinois Statutes). Upon trial the court sustained this claim for a lien and ordered that the garnishee pay $183.33, the amount awarded the attorney, into court "to be held until the further order of this court," and judgment was entered for appellant for the balance of the fund owing from the garnishee.

By this appeal appellant questions the action of the court in making the award to Walter Miller, saying that the contractual agreement for fees between him and Borg did not amount to an equitable assignment. It may be conceded that

some of the authorities cited, when applied to the terms of this contract, seem to support appellant's contention in this respect, but such cases arose prior to the enactment of the statute giving attorneys a lien for services, which became the law on July 1, 1909. Hence these cases do not control the present case.

Appellant does not even suggest in argument that Walter Miller is not entitled to a lien for services under this statute, and as the statutory formalities admittedly have been observed no reason occurs to us why the court should not have found that Miller was entitled to his lien. This finding was in accord with the provisions of the statute and the decisions in Standidge v. Chicago Railways Co., 254 Ill. 524, and Sutton v. Chicago Railways Co., 258 Ill. 581.

It is argued that the court should not have ordered the amount awarded to Walter Miller paid into court until its further order. We see no reason why the court should not have entered the same form of order with reference to this amount as was entered on the amount awarded appellant. However, we do not see that appellant was affected in any way by the form of this order, and the court in the exercise of its equitable powers in adjudicating an attorney's lien, could properly enter such an order as was entered herein.

The judgment is affirmed.

AFFIRMED.

Mar. Term 1914

173 - 20097

SARAH B. SMYTH-WALES,
Appellant,

vs.

JOHN M. SMYTH COMPANY,
a corporation,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

190 I.A. 66

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Sarah B. Smyth-Wales, appellant, a stockholder of the John M. Smyth Company, a corporation, appellee, by her bill sought to have appellee enjoined from purchasing from the John M. Smyth Merchandise Company, a corporation, capital stock of that company to the amount of $400,000 in satisfaction of an indebtedness of a like amount due appellee from the Merchandise Company. A temporary injunction was issued without notice. Appellee subsequently filed an answer, and affidavits were filed by both parties. Upon motion of appellee to dissolve the temporary injunction, after consideration of the bill, answer and affidavits the court ordered the bill dismissed for want of equity. Appellant seeks to have this order reversed.

Appellant is the owner of one-eighth of the capital stock of appellee, which is a corporation, organized in 1894, engaged in manufacturing and selling merchandise, principally house and office furniture and furnishings. About June 26, 1911, the John M. Smyth Merchandise Company, a corporation (hereinafter called the Merchandise Co.), was organized with a capital stock of $100,000, which was owned by the same persons owning the stock of appellee, who were heirs of John M. Smyth, the founder of the business. The president of appellee is the secretary of the Merchandise Co., and the secretary of appellee is the president of the Merchandise Co. The Merchandise Co.

took over and continued the mail order business theretofore conducted by appellee, and because of business dealings with each other the Merchandise Co. became indebted to appellee on an open account in the sum of about $400,000. Proceedings were instituted by the board of directors of the Merchandise Co. to increase its capital stock from $100,000 to $500,000, and the bill charges that it was not the intention of the officers of the Merchandise Co. to offer said increased stock to be subscribed or paid for by the stockholders in proportion to their various holdings therein, or to others, for the purpose of obtaining money to carry on the business of said company, but that the officers of appellee intended and intend to purchase such stock for and on behalf of appellee and "pay for the same by giving said Merchandise Company credit on its said indebtedness for the whole amount of said increased capital stock, at its par value, and, upon such stock being delivered (to appellee), it would release and discharge said Merchandise Company from the indebtedness now owing by it (to appellee), to the full amount of the par value of the stock so to be turned over to it by said Merchandise Company."

It is alleged that appellee has no legal power to purchase said stock, as such an act would be ultra vires, and appellant asks that "the defendant may be enjoined from purchasing the said increased capital stock of said Merchandise Company." Appellee by its answer denies that it was its intention to purchase or take such increased stock and pay for the same by giving the Merchandise Co. credit on any indebtedness due to it, or that the directors intended to purchase the stock. The affidavit filed by the officers of appellee company also disclaimed any intention on the part of the officers of appellee to purchase for or on behalf of it any of the stock of the Merchandise Co. at any time.

In Chicago Telephone Co. v. Northwestern Telephone Co., 199 Ill. 324 (on page 365), the court said: "It is well settled that a court of chancery will not grant an injunction to allay the fears and apprehensions of individuals, and will only grant protection against acts, which are not only threatened, but will in all probability be committed to the injury of the petitioner or complainant." It is also the rule that some fact or facts must appear from which the court can see that unless prevented the acts will in all probability be committed. Coquard v. National Linseed Oil Co., 171 Ill. 4[illegible]; 16 A. & E. Ency. of Law, second ed., 360; City of Chicago v. People's G. L. & C. Co., 170 Ill. App. 98.

Both parties seem to agree that appellee cannot legally purchase the stock of another corporation, and, as we have on one hand the affirmation and on the other the denial of an intention to do this illegal act, we must concern ourselves only with facts, if any appear, which will lead us to the conclusion that unless prevented the act in all probability will be performed. Two occurrences are said to lead to this conclusion. The first is that on a certain occasion one Thomas A. Leach, who is the attorney and general counsel for the appellee, stated to other attorneys who represented certain stockholders, that one H. K. Hitchcock, a vice-president of the First National Bank of Chicago, had suggested that it was desirable that the liability of the Merchandise Co. to the appellee should be retired and that proceedings should be undertaken to increase the capital stock of the Merchandise Co. to $500,000, and that the shares representing the increase, amounting to $400,000, should be used for the purpose of paying appellee the amount of money owing by the Merchandise Co. to appellee; and that Leach further said that the president and secre-

tary of the Merchandise Co. proposed holding a meeting of the stockholders of the Merchandise Co. to carry out this suggestion, but that he (Leach) had advised these officers against taking such steps, on the ground that, in the opinion of Leach, appellee could not legally accept shares of the Merchandise Co. in payment of the indebtedness owing by it to appellee. We fail to see in this statement of the attorney for appellee anything more than a report of a suggestion made by an officer of the bank with which the Merchandise Co. was doing business, to the officers of the Merchandise Co., and a willingness on the part of the officers of the Merchandise Co. to carry out the suggestion, subject to the advice of their counsel, which advice was that such a suggestion was not legally possible of performance. The most reasonable inference to be drawn from Leach's statement is that because of his counsel adverse to the scheme it would not be attempted. We think it is proper to presume that appellee would be guided by the advice of its attorney in this respect. At least there is no basis for concluding that in all probability appellee would act contrary to the opinion of its legal adviser, and hence we do not find in the statement attributed to Leach any ground for the injunction prayed for.

The second fact presented is that upon the receipt by appellant of the notice of a meeting of the stockholders of the Merchandise Co. for the purpose of voting upon the proposition of increasing the capital stock, she appointed one Cohen, an attorney, her proxy to attend this meeting; that the time mentioned in the notice was 10 o'clock A. M. on October 14, 1913, and the place the office of the Merchandise Co., 701 Washington boulevard, Chicago; that Cohen went to this place shortly before 10 o'clock, and upon inquiry of a man standing inside the building near the entrance door as

to the place of the meeting of the stockholders of the Merchandise Co., was informed by this man that he knew nothing of such a meeting nor of any room where it was to be held; that he stepped outside of the building for a few minutes, and shortly thereafter saw the officers and certain stockholders of the Merchandise Co. coming from the building with their attorney, and Cohen was then informed that the meeting had taken place and that the vote had been in favor of the increase in the capital stock. It is denied by affidavits that the meeting was held secretly with the design of excluding appellant or her proxy, and it is said that the meeting was held in the room usually occupied by the stockholders, directors and officers, and that the meeting was not called to order until six minutes after 10, for the purpose of giving any stockholder or any proxy time to attend if he saw fit so to do. We do not attach much weight to any inference sought to be drawn from the rather uncertain statements made by the unidentified man of whom Cohen made inquiry; but giving to the incident all the credit appellant claims for it, we do not think it can be said to show an intention on the part of appellee to purchase stock in the Merchandise Co. The substance of the occurrence is that the capital stock of the Merchandise Co. was increased at a meeting of stockholders; and the failure of appellant's proxy to attend, whether through design or otherwise, is of no importance, for apparently the purpose of the meeting would have been accomplished even if the proxy had been present. At most the incident only tended to show a situation of conflict between the stockholders which may be grounds for apprehension by appellant but is not such a fact as will justify this injunction.

Manifestly it cannot be said that the increase in the capital stock of the Merchandise Co., standing alone,

furnishes any basis for an injunction against appellee, another corporation. The Merchandise Co. is not a party to this cause, and the legal sufficiency of the increase is not before us. Considering this fact with all the other facts, the majority of the court finds nothing more than plausible reasons for suspicions or apprehensions, and not facts of sufficient impressiveness to warrant a conclusion that the apprehended act will in all probability be committed.

We cannot assent to the claim that the injunction should be permitted to continue unless it appears to be harmful to appellee. A groundless injunction should not be continued.

For the reasons above indicated the order dismissing the bill is affirmed.

AFFIRMED.

Mr. Justice Baker dissents.

426 - 20366

HOLY NAZARENE TABERNACLE CHURCH,

vs.

MATTIE L. THORNTON et al.

On Appeal of MATTIE L. THORNTON,
Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

190 I.A. 68

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of punishment based upon a finding that Mattie L. Thornton, appellant, was guilty of contempt of court in that she wilfully violated an injunction. Appellant claims as ground for reversal that prior to the doing by her of the things claimed to have been done in violation of the injunction, the bill of complaint which was the basis for the injunction had been dismissed. If this is true there was no injunction which could be violated by appellant, and the entry of the judgment in contempt was erroneous.

The complainant, describing itself as the Holy Nazarene Tabernacle Church, it its bill alleged that it was "a corporation duly incorporated under the laws of the State of Illinois," and sought and obtained an injunction restraining appellant and her attorneys from doing certain things with reference to said church. To this bill appellant filed a plea of nul tiel corporation. A reference was had to a master in chancery, who made a report. Subsequently appellant moved the chancellor to confirm the master's report and to dismiss

the bill of complaint, and thereupon it was ordered as follows:

> "On Motion of solicitor for defendant, the Court having read and carefully examined the Report of the Master in Chancery, * * the motion of said defendant, Mattie L. Thornton, to dismiss said Bill of Complaint of the Complainant herein on the plea of said defendant, Mattie L. Thornton of Nul Tiel Corporation; and the Court having heard the argument of counsel for said complainant on the Exceptions to said Master's Report and the argument of Counsel for said defendant in support of the finding in said Report of said Master, and now being fully advised in the premises doth sustain said Report of said Master in Chancery.
>
> "It is therefore ordered, adjudged and decreed by the Court that said Report is hereby sustained, and the defendant, Mattie L. Thornton, is hereby restored to all rights, which she had prior to the issuing of the injunction herein."

While this order is inartificially drawn and properly may be criticised both as to form and in its lack of definiteness, yet considered in the light of what was evidently intended, we are of the opinion that it is in substance an order for the dismissal of the bill. The bill being dismissed, the dissolution of the injunction followed. In so holding we are in accord with what was said in Thomson v. McCormick, 136 Ill. 135, 141, where the court had under consideration a somewhat similar order characterized as "very informal and almost unintelligible": "No formal order dissolving such injunction appears in the record, but it does appear therefrom that demurrers were sustained, long prior to the trial, to all those portions of the bill which sought to enjoin the prosecution of the suit at law, and that no leave was either asked or given to amend the bill,- and this action of the court, dismissing out of the case all the charges in the bill upon which the injunction was based, was, in substance, a dissolution of the injunction."

For the reason indicated the judgment is reversed.

REVERSED.

June Term 427

427 - 20367

HOLY NAZARENE TABERNACLE CHURCH

vs.

MATTIE L. THORNTON et al.

On Appeal of W. O. ANDERSON,
Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

190 I.A. 69

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This case involves the same situation considered in case No. 20366, opinion filed this day. In this case, however, the appellant is W. O. Anderson, the attorney for Mattie L. Thornton, appellant in the other case. The same judgment entered in that case against Mattie L. Thornton was entered in this case against Anderson, who has appealed therefrom.

For the reason stated in our opinion in the other case the judgment is reversed.

REVERSED.

149 - 19538

CORPORATION SERVICE COMPANY,
a corporation,
Plaintiff in Error,

vs.

BOLGER, MOSSER & WILLAMAN,
a corporation,
Defendant in Error.

Error to
Municipal Court
of Chicago.

190 I.A. 75

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error sued defendant in error to recover $128 claimed to have been earned under an agreement embodied in the following letter signed by defendant in error:

"Chicago, Ill., July 29, 1912.

The Corporation Service Co.,
8 So. Dearborn St.,
Chicago.

Dear Sir:

Confirming understanding with your Mr. Graham today, beg to state that we accept your proposition to represent us before the State Board of Equalization in the matter of our capital stock taxes for the year 1912, for which service we are to pay you 50% of what we may save under $252.

Yours very truly,
Bolger, Mosser & Willaman,
By A. C. Heckler."

Pursuant to said letter, plaintiff, by its attorney, appeared twice before said State Board with reference to its fixing the assessment on defendant's capital stock. In the meantime, the Supreme Court, in O'Connell v. Federal Securities Co., 253 Ill. 581, decided that the State Board of Equalization had no power to assess the capital stock of a corporation for mercantile purposes, but that the assessment should be made by local assessors. At a subsequent appearance before said Board, plaintiff's attorney called its attention to said decision and to the fact that defendant was a corporation organized for mercantile purposes, and, because the Board did not assess defendant's stock, plaintiff claims that it thereby saved defendant $252 and is entitled to 50% thereof. It appears that in

the previous year said Board did assess defendant's stock and the tax levied thereon was $252, and evidently, when said letter was written, the parties contemplated and assumed that the Board would again exercise the same power, which, perhaps, it would have done but for said decision. That it did not do so, however, was the result of the law and not plaintiff's efforts. The conditions of the contract, therefore, were impossible of fulfillment. It contemplated that a tax would be levied on an assessment made by said Board and would, in consequence of such assessment, be lower than $252, but no tax was, or legally could be, levied on an assessment made by said Board. Plaintiff made the value of its services contingent upon something it could not perform. The court properly directed a verdict for defendant. The judgment will be affirmed.

AFFIRMED.

19764
383 - 19764

Ordered to be reported in full

THE NEWS PUBLISHING COMPANY,
a corporation,
Appellant,

vs.

ASSOCIATED PRESS OF ILLINOIS
et al., (defendants),

VICTOR F. LAWSON,
Appellee.

Appeal from
the Circuit Court,
Cook County.

190 I.A. 0

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was an action on the case in which there was a verdict and judgment in favor of defendant Lawson and one against his co-defendant, the Associated Press. We have already reviewed the record on a writ of error sued out by the latter and decided that it presents no cause of action. Such conclusion, therefore, renders discussion of any other question unnecessary.

However, if there was a cause of action, the only question on this appeal would be whether the verdict as to Lawson was manifestly against the weight of the evidence. Appellant discusses the case upon the theory that Lawson was the agent of the Associated Press in an illegal transaction, and, therefore, equally guilty with it, and, hence, if the verdict was correct as to the Associated Press, it was inconsistent and wrong as to Lawson. The declaration, however, is not predicated upon the theory of principal and agent, but avers joint liability, and, of course under such an averment in a tort case one or more of the defendants may be found guilty or not guilty, (Hussman v. Mich. Cent. R. R. Co., 230 Ill. 465-469), and this fact is recognized by appellant in instructions given at its request. But, after a full examination of the evidence, we do not think we would be justified in disturbing the jury's

verdict on the ground that it is not sustained by the proof or that it is clearly against the weight of the evidence, even had we held otherwise as to the existence of a cause of action. But, in view of that holding, no purpose would be subserved in analyzing the evidence, as it is conceded by appellant that if no cause of action existed against the Associated Press then none existed against Lawson.

The judgment, therefore, will be affirmed.

AFFIRMED.

Mr. Justice Gridley: I concur in the conclusion that the judgment in favor of the defendant, Victor F. Lawson, should be affirmed, but for the reason that it does not appear that the jury's verdict is clearly against the weight of the evidence.

124 - 30045

CITY OF CHICAGO,
Defendant in Error,

vs.

JOHN NIEDZWIALEK,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

190 I.A. 109

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The motion of defendant in error to strike from the record the so-called "statement of facts" as not being a document of the character required by Section 23, par. 6, of the Municipal Court Act, will be granted in accordance with previous rulings in this court that a mere narrative of the witnesses' testimony, or substance thereof, does not constitute such a statement, even though certified to as such by the trial judge. (Allen v. Roughan, 175 Ill. App. 180; Schiavone et al. v. Dedde, 179 id. 91; Kellogg v. City of Chicago, 178 id. 138.)

Therefore, the assignments of error, being based entirely upon such document, cannot be considered, and the judgment will be affirmed.

AFFIRMED.

191 - 20115

Gathemann

LUDWIG A. D. GATHEMAN,
Plaintiff in Error,

vs.

SAMUEL ROSENFELD,
Defendant in Error.

Error to
Superior Court,
Cook County.

190 I.A. 110

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This suit was brought by a tenant against a landlord to recover damages in consequence of the presence of gas fumes in the bath room of the demised premises resulting from the use of a gas water heater without a proper vent pipe connection.

Demurrers to the original and first amended declarations were sustained. To the second amended declaration defendant filed pleas of the general issue and statute of limitations. A demurrer to the latter plea was overruled. Plaintiff elected to stand by his demurrer whereby judgment was entered for defendant, to reverse which this writ of error was sued out.

The original declaration is very inartifically drawn. It is in one count. After setting up the relation of the parties, existence and purpose of the water heater in the bath room, it charges defendant with negligence, (1) "in failing to use a certain vent pipe connection" (thus indicating its existence), and what is repugnant and inconsistent therewith, (2) in refusing to place one in after being notified (whether before or after the tenant's occupancy is not stated), and (3) in permitting the water heater to be used knowing, etc., "the dangerous condition of said water heater without a vent pipe connection thereto."

Counsel for plaintiff in error argues that, if not directly by implication at least, said declaration contains the several elements of such a cause of action, as defined in Bunsack v. Morey, 198 Ill. 571. But neither by justifiable implication or

warranted inference can it be said to state any cause of action, to say nothing about its inconsistent allegations.

In the first place, it is not distinctly set forth in the declaration that there was a defect, or that there was no vent connection; but if it could be so construed, it fails to allege a concealed defect, and that the landlord knew, or could reasonably know, of it. In the second place, no negligence could be predicated on the landlord's failure to use the vent pipe connection; nor merely on his failure to connect the heater with it, or to permit its use without such connection; nor does it appear that the want of a connection or of a vent pipe was not open to the tenant's observation. There were no allegations of fact showing that the tenant had a right to rely on the existence of a vent pipe or connection therewith. The allegation that he did not know the danger of using the water heater does not supply the omission and states nothing for which the landlord was responsible.

In fact, we are unable to discern from the declaration what was the defect claimed,- whether it was the non-existence of a vent pipe or the failure to connect the heater with it. We think the declaration fails absolutely to disclose any defect or, if one, that it was concealed or that knowledge of it was chargeable to the landlord, or that it was not discoverable or ascertainable by the tenant. The declaration is so manifestly lacking in those and other elements essential to such a cause of action that a closer analysis thereof is unnecessary.

The second amended declaration relies upon an entirely different cause of action, not the failure of defendant to use the vent pipe connection, and his permitting its use by the tenant, but negligence in failing to warn or inform the tenant of a concealed defect in the demised premises and the dangers connected therewith after the landlord knew of them. Stating as it does a different cause of action and filed as it was after the statute of limitations

has run, a demurrer to the plea of the statute was properly overruled and plaintiff electing to stand by his demurrer, judgment against his was properly rendered and will be affirmed.

AFFIRMED.

214 - 20141

FRANK T. BAIRD,
Defendant in Error,

vs.

GUSTAV K. NELSON,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

190 I.A. 111

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The judgment obtained in this case was for real estate commissions claimed to have been earned by the plaintiff as the procuring or efficient cause of the sale of defendant's premises. The contention is that the verdict is against the manifest preponderance of the evidence, and we think it is well taken. It shows that Nelson, the owner, and Zipperman, the purchaser of the property, were brought together through another agent in June, 1912, when the sale was effected; that plaintiff submitted the property to Zipperman about April, 1911, but that no negotiations for a sale to him were kept up after September, 1911; that Baird did not disclose the name of Zipperman to the owner or his agent nor the name of the owner to Zipperman though requested to do it, and that Zipperman did not accept the terms submitted by Baird. We think the preponderance of the evidence also shows that the negotiations between Baird and Zipperman were abandoned and that some nine months later, without knowledge on the part of the owner that Zipperman had ever been seen by Baird and without previous knowledge on the part of Zipperman that Baird was the owner of the property, they were brought together through the distinct and efficient efforts of another party, and that Baird's efforts were not the procuring cause of the sale. The judgment must be reversed.

REVERSED.

238 - 20165

FRANK KUBASIAK,
Defendant in Error,

vs.

LOUIS D. LOS,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

190 I.A. 112

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Kubasiak, plaintiff below, sued Los for the return of money which he claimed was withheld by the latter against his consent. On the death of Kubasiak's wife, he became entitled to $750 as beneficiary to insurance on her life in the National Protective Legion, a fraternal organization of which she was a member and of which Los was local manager. His duties as such were merely to obtain new members and collect dues during the first five months of their membership. His sole compensation was a commission derived from the business he procured. It does not appear that he has any relationship with said Protective Legion of a fiduciary character. The court, however, held as a proposition of law that Los could not enter into a legal contract with Kubasiak by reason of such a relationship existing between him and said Legion. The evidence in the case was not such as to justify such holding.

The contention of Los was that the money was given to him in payment of services he rendered under contract with Kubasiak to collect the policy. While there was controversy over the facts whether there was such a contract and whether the money was voluntarily paid, yet the court's conclusions evidently did not rest upon the testimony relating thereto, which seems to preponderate in favor of defendant, but upon its views as to such relationship. The judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

257 - 25187

MARGARET MOORE, Plaintiff in Error, vs. CHICAGO CITY RAILWAY COMPANY, Defendant in Error.	Error to Municipal Court, of Chicago.

190 I.A. 113

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The plaintiff in error brought suit against defendant in error for injuries which she claims to have sustained in alighting from a car of the latter. The plaintiff and three other passengers testified to the occurrence. Defendant had no witnesses to the res gestae, and judgment was in the latter's favor. It is urged that such judgment is against the evidence, and we think it was.

It is very skilfully argued by counsel for defendant in error that there was such inherent improbability and conflict in the testimony given in plaintiff's behalf that the jury were justified in rejecting her theory of the accident and may well have believed that she attempted to alight from the car before it had stopped. After a critical examination of the entire testimony, we do not think that the jury were so justified. We find nothing therein that would reasonably justify the defendant's theory or the jury's rejection of the evidence bearing upon negligence. While defendant appears to have received no report and to have had no knowledge of the accident, it cannot be doubted that it took place.

Plaintiff claims that she was assisted off the car by the conductor and that the car started while she had only one foot on the ground and still had hold of the car handle, and that she fell on her left side receiving certain bruises. Her attending physician corroborated the fact that she was bruised upon the left side. Two passengers who got off the front end of the car corroborated the fact that she had fallen on the street and that the car suddenly stopped shortly thereafter, leaving her on the ground about four or five feet

back of the car. One of them heard the car start up just after he left it, and a moment afterwards saw her lying on the street, and a lady passenger with whom she sat testified that plaintiff got up to go out by the rear door after the car came to a standstill; that the car stopped a short time and then started again with a jerk suddenly and she then heard somebody say that a lady had been thrown off the car. We think the plaintiff was corroborated in every essential particular and fail to find anything inherently improbable, suspicious or unreliable about her testimony, or that of her witnesses. Possibly she may have exaggerated her ills and been too ready to attribute them all to the accident, but the verdict was against the evidence and she is entitled to a new trial.

REVERSED AND REMANDED.

377 - 20208 20208

JOHN E. NYMAN and HAL M. ORR,
Defendants in Error,

vs.

FERDINAND G. GASCHE and MRS.
FERDINAND G. GASCHE,
Plaintiffs in Error.

Error to
Municipal Court
of Chicago.

190 I.A. 115

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Nyman and Orr, two dentists occupying separate rooms in the same suite of offices, sued Mr. and Mrs. Gasche for dental services rendered to the latter.

Most of the assignments of error are predicated on the alleged insufficiency of the evidence, especially the evidence bearing on the questions whether the contract for services was with one or both of the plaintiffs, and whether there was a breach of contract and failure to perform on their part. On these matters and all other questions of fact there was evidence tending to support plaintiffs' theory of the case, and, therefore, the court properly denied defendants' motion to direct a verdict made at the close of all the evidence. But the question of the weight or sufficiency of the evidence is not, in the absence of a motion for a new trial, before us for consideration. (Pate v. Blair-Big Muddy Coal Co., 352 Ill. 198.) The transcript of the clerk recites that such a motion was made and overruled, but the failure to preserve the same in a bill of exceptions cannot be obviated by such recitals. (Call v. People, 201 Ill. 466; East St. L. Electric R. R. Co. v. Cauley, 148 id. 490; Gill v. People, 42 id. 321.)

Two instructions given to the jury at plaintiffs request, relating to the ground of liability and measure of damages where there is a breach of contract, are complained of as ignoring certain evidence tending to show a breach of the contract on the part

of plaintiffs. As framed they were designed to present plaintiffs' theory of the case and not defendants', which was presented by other instructions given at defendants' request. We find no error therein. The judgment will be affirmed.

AFFIRMED.

289 - 20220

WALLACE L. DE WOLF, et al.,
Appellees,

vs.

MARGUERITE SPRINGER, as Executrix of Last Will and Testament of WARREN SPRINGER, Deceased,
Appellant.

Appeal from
Circuit Court,
Cook County.

190 I.A. 116

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal questions the power of the court to amend in certain respects a judgment at a term subsequent to its entry.

The order entered found due from Warren Springer in his lifetime the sum of $35,000, and provided "that judgment be and the same is hereby entered upon said finding against the estate of said Warren Springer, deceased, and against said Marguerite Springer as executrix of the last will and testament of the said Warren Springer, deceased." The material change effected by the amendment was the striking out of the words "estate of said Warren Springer, deceased," and adding "as a claim of the seventh class to be paid in due course of administration."

That such amendment made a change in a matter of mere form and not of substance, as contended for by appellant, and is one which may be made after the term from the pleadings and files in the case and the entries in the clerk's minute books, is hardly a debatable question. In Welch v. Wallace, 3 Gil. 490, and Darling v. McDonald, 101 Ill. 370, the above words, "to be paid in due course of administration," were regarded as matter of form and that was also the effect of the holding in Channel v. Merrifield, 206 id. 278, where an amendment, like the one in the case at bar, was on motion and notice after the term had closed, allowed and sustained.

The classification of the claim in the judgment was

also a matter of form in harmony with the statutes relating to the allowance of claims and rendering judgments against estates. As stated in the Darling case, supra, "although it is not within the letter of the statute to classify it with claims allowed by the county court, it is within the clear and manifest spirit and purpose of the statute to do so."

But it is argued that the judgment was entered by consent. Even if that was so, such consent went to the substance rather than to the form of the judgment, and it is always within the power of the court under the statute of amendments and jeofails, to correct the latter in order to render the judgment effective, "so that it shall not be reversed and annulled." (Tosetti Brewing Co. v. Koehler, 200 id. 269.) The court did not err in allowing the amendment.

AFFIRMED.

19512
38 - 18513

EDWARD J. TOOLAN,
Defendant in Error,

vs.

CHICAGO DAILY NEWS COMPANY,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

190 I.A. 117

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

Edward J. Toolan, plaintiff, commenced a fourth class action in the Municipal Court of Chicago to recover damages for personal injuries against Chicago Daily News Company, a corporation (hereinafter referred to as the News Company), and C. N. Pierson, Henry Pierson and Charles B. Pierson, trading as C. N. Pierson & Sons, defendants. The joint appearance of all the defendants was entered, and the cause submitted to the court for trial without a jury. At the close of plaintiff's evidence, on motion of defendants' attorney and without objection on plaintiff's part, the suit was ordered dismissed as to the three Piersons and the trial proceeded against the News Company as sole defendant. At the close of all the evidence the court found the News Company guilty as charged andassessed plaintiff's damages at $100 in tort. After overruling a motion for a new trial the court, on April 19, 1913, entered judgment on the finding against the News Company, which judgment it is sought by this writ of error to reverse. The defendant in error (plaintiff) has not here filed a brief.

The material facts are as follows: About 8 o'clock, Saturday evening, April 18, 1910, plaintiff was driving a horse and wagon west on Harrison street, Chicago. As he was crossing Dearborn street a horse and wagon driven by one McNally, ran into plaintiff's wagon, and plaintiff was thrown to the ground and suf-

fered the injuries complained of. The wagon driven by McNally had on it the words, "The Daily News Delivery," and it was owned by Henry Pierson. By contract Pierson had leased the wagon, together with other wagons, to the News Company, which company published a daily (except Sunday) afternoon newspaper of several editions. Unless an extra edition was published, the last edition left the office of the News Company at six o'clock. No extra edition was published on the night in question. The Chicago Record-Herald Company, a corporation distinct from the News Company and under an independent management, published a daily morning paper. The so-called "Bull Dog" edition of its Sunday morning paper was carried in some of said wagons to the outgoing trains about eight o'clock Saturday evening. Pierson was superintendent of delivery for each company. After the deliveries of the papers of the News Company had been made some of said wagons were used to deliver papers published by the Record-Herald Company. Pierson employed the drivers of said wagons and paid them their wages. He was reimbursed for said payments of wages by the News Company, and the Record-Herald Company in turn paid the News Company the amount of the wages of all drivers making deliveries of papers of the Record-Herald Company, plus a share of the overhead expense proportionate to the actual payroll for each company's deliveries. It appears that the News Company had no control over the drivers employed by Pierson for making deliveries for the Record-Herald Company, or over any question which might come up as to the delivery of papers of the Record-Herald Company. It further appears that the driver of the wagon in question, McNally, was on the payrolls as being employed in work for the Record-Herald Company on the evening in question.

It is contended by counsel for the News Company that the judgment should be reversed because the evidence does not disclose that the relation of master and servant existed between the

News Company and the driver of the wagon, McNally, whose negligence, it is alleged, caused plaintiff's injuries, and, hence, the News Company is not responsible. We agree with the contention. It does not appear that the News Company had any control over the driver of the wagon on the evening in question. In Pioneer Construction Co. v. Hansen, 176 Ill. 100, 108, it is said: "He is the master who has the choice, control and direction of the servants. The master remains liable to strangers for the negligence of his servants, unless he abandons their control to the hirer. Control of servants does not exist, unless the hirer has the right to discharge them and employ others in their places. The doctrine of respondeat superior is applicable, where the person sought to be charged has the right to control the action of the person committing the injury. It follows, that the right to control the negligent servant is the test, by which it is to be determined whether the relation of master and servant exists." (See, also, Consolidated Fireworks Co. v. Koehl, 190 Ill. 145; Grace & Hyde Co. v. Probst, 208 Ill. 147, 151.) The evidence shows that the driver of the wagon, McNally, was engaged on the evening in question in making deliveries of papers for the Record-Herald Company; that he was employed by Henry Pierson, superintendent of the deliveries of papers published by the Record-Herald Company and also superintendent of the deliveries of papers published by the News Company; that Pierson in the first instance paid him and the other drivers of the wagons their wages; that by an arrangement Pierson upon presentation of the payrolls was reimbursed by the News Company for the wages of all drivers so paid by him, and that in turn the Record Herald Company reimbursed the News Company for all wages of drivers of wagons engaged in making deliveries of papers published by the Record-Herald Company. In our opinion the fact that some of the wagons were used by both companies, and the further fact that the News Company merely advanced, in the manner stated, the

wages of drivers engaged in making deliveries for the Record-Herald Company, do not militate against counsels' contention that the relation of master and servant did not exist between the News Company and the driver of said wagon on the evening in question. (See Powell v. Construction Co., 88 Tenn. 692, 701; Murray v. Currie, L. R. 6 C. P. 24.)

The judgment of the Municipal Court is reversed, but the cause is not remanded.

JUDGMENT REVERSED WITHOUT REMANDING.

FINDING OF FACTS. We find as facts that the driver, McNally, of the wagon which ran into the wagon driven by plaintiff, on the evening of April 18, 1910, was not the servant of the defendant, Chicago Daily News Company; that said driver at the time was not under the control or direction of said defendant, and that said defendant is not responsible to plaintiff for the injuries sustained by him.

47 - 19604

GEORGE P. BENT COMPANY,
a corporation,
Defendant in Error,

vs.

MICHAEL ZIMMER, Sheriff of
Cook County, Illinois, KATE
FRANKLIN and H. O. FRANKLIN,
Plaintiffs in Error.

Error to
Municipal Court
of Chicago.

190 I.A. 119

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In the Circuit Court of Grundy County, Illinois, George P. Bent Company, a corporation with principal office in Chicago, Illinois, and hereinafter referred to as the Bent Co., instituted a replevin suit against Kate Franklin for the recovery of "One Crown Piano, No. 49386." The piano was taken under the replevin writ and delivered to the Bent Co. in Chicago. Subsequently, on the trial of the suit in said Circuit Court the Bent Co. took a non-suit, and the court ordered that a writ of retorno habendo issue for the return of the piano to Kate Franklin, and that she recover costs and have execution therefor. On April 16, 1913, such writ was issued directed to the sheriff of Cook County to execute, in and by which writ the sheriff was commanded to cause said piano without delay to be returned to her, etc. Subsequently the sheriff, in execution of said writ, took the piano from the Bent Co., and while the same was in his possession, on April 22, 1913, the Bent Co. instituted another replevin suit (the present suit) in the Municipal Court of Chicago to recover the piano. The replevin affidavit was signed by D. E. Flick, an agent of the Bent Co., in which it was alleged that the Bent Co. "is the owner of and is now lawfully entitled to the possession of" the piano of the value of $150, that on April 22, 1913, "Michael Zimmer, Sheriff of Cook County, Kate Franklin and H. O. Franklin wrong-

fully took and now wrongfully detain" the piano, and that the same has not been seized under any execution or attachment, nor held by virtue of any writ of replevin against said Bent Co. The replevin writ was directed to the Bailiff of the Municipal Court and it was returned showing that on April 22, 1913, the bailiff had replevined the piano, had delivered the same to the Bent Co., taking its receipt therefor, and had served the writ on said sheriff, Michael Zimmer, but not showing any service on the Franklins. Subsequently, Michael Zimmer, sheriff, entered his appearance and filed an affidavit of merits, in which he alleged, in substance, that the material allegations of the replevin affidavit were untrue and that, when the writ was served upon him and the piano taken from him by the bailiff, he was lawfully in possession of the piano by virtue of said writ of <u>retorno habendo</u>. Neither of the Franklins entered an appearance in the case, and it was ordered that the trial of the cause be postponed until May 19, 1913, for notice by publication. On that day the case came on for trial before the court without a jury, and neither of the Franklins appearing they were defaulted. Evidence was taken and arguments made by counsel for the Bent Co. and for Michael Zimmer, sheriff, and the court found that the right to the possession of the piano was in the Bent Co., and assessed its damages "for the detention thereof while the same was wrongfully detained by the <u>defendants</u> at the sum of one cent." On the same day, May 19, 1913, the court entered judgment on the finding, adjudging that the Bent Co. "have and retain possession of the property replevied herein," and recover of the defendants said damages and costs.

After an examination of the transcript before us we are of the opinion that the finding is not supported by the evidence and that the court erred in entering the judgment. As appears from the stenographic report of the proceedings at the trial, three witnesses testified in behalf of the Bent Co. Over the ob-

jection of counsel for Michael Zimmer, sheriff, a copy of a transcript of proceedings in another replevin suit, brought by the Bent Co. against H. O. Franklin and Kate Franklin in Beaver County, State of Oklahoma, in 1911, was offered and received in evidence. Counsel for the Bent Co., while claiming that said transcript was admissible as against the Franklins, conceded that it was not admissible as against Michael Zimmer, sheriff, in the present suit. Much time was consumed at the trial in the attempt on the part of the Bent Co. to introduce an alleged copy of a certain written agreement, the original of which it was claimed had been lost, entered into by and between H. O. Franklin and the Bent Co. some years prior to the institution of the present suit, but said copy was not admitted, and it does not appear what the agreement was. We do not think the evidence shows that when Michael Zimmer, sheriff, obtained the temporary possession of said piano, he wrongfully took the same from the Bent Co., or was wrongfully detaining the same from the Bent Co. He was obeying the command of the Circuit Court of Grundy County, under said writ of <u>retorno habendo</u>, to cause the piano without delay to be returned to Kate Franklin. His temporary possession was lawful. Neither does the evidence disclose that at the time the piano was replevined from him the Bent Co. was <u>then</u> lawfully entitled to its possession. In our opinion the court, under the evidence, should have entered a judgment for a return of the piano to Michael Zimmer, sheriff.

Accordingly the judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

SS - 30,000

GEORGE H. SCHNEIDER and HOMER H. SCHNEIDER, copartners, etc., Defendants in Error, vs. ROBERT COMMONS, Plaintiff in Error,	Error to Municipal Court of Chicago.

190 I.A. 121

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

George H. Schneider and Homer H. Schneider, real estate brokers in Chicago, Illinois, trading under the firm name of G. H. Schneider & Co., commenced a fourth class action in the Municipal Court of Chicago against Robert Commons, defendant, to recover $150 as commissions for procuring a purchaser for defendant's premises, known as No. 1349 Jackson boulevard, Chicago, "as per a certain agreement made on or about August 9, 1913, and ratified on or about August 20, 1913." The defendant, in his affidavit of merits, claimed that the plaintiffs never consummated the sale of the premises, and were not given any authority to make the sale. The defendant further claimed a set-off or counter-claim of $350, by reason of the fact, as alleged, that plaintiffs signed and delivered to the purchaser, William H. Oliver, a written contract of sale of the premises, without any authority from defendant, and said contract of sale was recorded, and thereby defendant's title to the premises was clouded and he was damaged to the extent of $350. The case was tried before a jury, resulting in a verdict finding the issues against the defendant and assessing plaintiffs' damages at $150, upon which verdict judgment against the defendant was entered.

The material facts, as disclosed by the testimony of plaintiffs' witnesses and certain documents, are substantially as follows: In November, 1911, the defendant listed the premises with

the plaintiffs for sale, and some time thereafter plaintiffs, through their agent, S. H. Lyon, negotiated with William H. Oliver, a prospective purchaser. Oliver offered $5,500 for the premises but defendant refused the offer. Subsequently defendant told Lyon that he would take $6,000 for the property. Lyon thereafter procured Oliver's signature to a written instrument, bearing date August 3, 1912, wherein it was stated that Oliver agreed to pay $6,000 for the premises and Commons agreed to sell the same at that price, $250 having been paid by Oliver as earnest money and $5,750 to be paid by Oliver at the office of G. H. Schneider & Co., when a good and sufficient warranty deed was ready for delivery. Lyon also procured from Oliver his check for the $250, earnest money. Thereafter Lyon wrote a letter to defendant, dated August 6, 1912. This letter was signed "G. H. Schneider & Co., By S. H. Lyon," and it was therein stated;

> "We have this day sold your property * * to William H. Oliver who has paid a deposit of $250. He is to pay you $6000 for the property and the taxes for the year 1912; you are to pay for the bringing down of the abstract and to pay us a commission of 2½ per cent. on the purchase price amounting to $150. * * As per your instructions we have this day ordered the continuation of your abstract. We will advise you as soon as we are ready to close the deal."

Some time during the latter part of August, 1912, defendant called at the office of Schneider & Co., exhibited said letter of August 6th, and, according to the testimony of Lyon and G. H. Schneider, told both of them that the terms of sale contained in said letter were all right, that everything was satisfactory, that he was soon going on a trip to California and that upon his return he would close the deal. Subsequently G. H. Schneider, at Oliver's request, signed the written instrument or contract, dated August 9th, as agent of defendant. It was signed "Robert Commons, by G. H. Schneider & Co., Agents," and delivered to Oliver. It was recorded August 29, 1912, but who recorded it does not appear, although Oliver testified that he may have asked somebody to record it. The defendant

went to California on September 2nd, returning about September 18th. Just before he went to California Otto Kerner, who as Oliver's attorney had examined the abstract of title to the premises, called on defendant. Oliver accompanied him. They told him that the title was all right and that they were ready to close the deal. According to their testimony he replied that he had made the contract and was going to carry it out, and that as soon as he returned from California he would close the deal. Oliver further testified that a few days after defendant returned to Chicago defendant told Oliver that he had decided he did not want to move out of the premises and would not consummate the deal. Oliver had previously tendered to him a certified check for $5,750 and plaintiffs had tendered to him the $250 earnest money previously deposited with them by Oliver. The evidence showed that Oliver was at all times ready, willing and able to take a conveyance of the premises and pay the purchase price, and that no conveyance of the property was ever made by defendant to Oliver. The evidence also showed that the usual rate of commission allowed brokers in Chicago upon a sale of real estate, above $3,000, was 2½ per cent. on the purchase price.

The defendant was the only witness called in his behalf. He denied that he had ever authorized plaintiffs to sell the premises at any fixed price. He admitted receiving plaintiffs' letter of August 9th and going to plaintiffs' office with said letter, but denied that he then told either Schneider or Lyon that the terms of sale, as mentioned in said letter, were all right, etc., but he does not testify that he then protested against the actions of plaintiffs as outlined in said letter. He further denied that he at any time told Oliver or his attorney that upon his return from California he would close the deal.

We think it was shown by a preponderance of the evidence that defendant verbally authorized plaintiffs to sell the

premises for $8,000; that plaintiffs found a purchaser, Oliver, who at all times was ready, willing and able to pay that price in cash upon the delivery to him of a good and sufficient warranty deed to the premises; that defendant in effect verbally authorized plaintiffs, as his agent and in his behalf, to sign said contract of August 9th, and by his subsequent conduct ratified plaintiffs' action in signing the same; that afterwards defendant refused to convey the premises to Oliver without fault on plaintiffs' part, and that the transfer was not made solely on account of defendant's said refusal. In our opinion the verdict of the jury was fully warranted by the evidence.

Counsel for defendant contends that, inasmuch as it appears that defendant never gave plaintiffs written authority to sell the premises or to sign said contract of August 9th on defendant's behalf, and never in writing ratified the action of plaintiffs in signing said contract, plaintiffs cannot recover commissions, even though it appears that the sale was not consummated solely on account of defendant's refusal to convey. We do not understand this to be the law. In Fox v. Starr, 108 Ill. App. 273, 274, it is said: "When a real estate agent makes a verbal contract for the sale of land, void under the statute of frauds, and which his principal refuses to carry out, the agent is nevertheless entitled to his commissions upon showing that the prospective purchaser was able, ready, and willing to comply with his contract." In Monroe v. Snow, 131 Ill. 180, Monroe verbally authorized Snow & Dickinson, real estate brokers, to sell his land, and the brokers entered into a written contract of sale with one De Zeng, upon terms authorized by Monroe. Subsequently Monroe refused to convey and the brokers brought suit for their commissions. The contract was signed "Stephen Monroe, by Snow & Dickinson, his authorized agent," and by De Zeng. It was argued that the trial court improperly admitted said contract in

evidence on the ground that the brokers had no written authority to make the sale, but the court held that the contract was properly admitted in evidence "as tending to show that plaintiffs had made a valid sale binding on the purchaser, and enforcible by the vendor." The court further said (p. 135): "A person may employ a broker or agent to negotiate a sale of real estate without giving him written authority so to do. As between the vendor and vendee the authority of the agent of the vendor must be in writing, but the rule goes no further. * * The defendant's repudiation of his agent's contract of sale will not deprive such agent of compensation for his services." (See, also, Holden v. Starks, 159 Mass. 503.) The cases of Wilson v. Mason, 158 Ill. 304, and Lawrence v. Rhodes, 188 Ill. 98, cited by counsel, do not appear to be in point, as they were cases where the purchaser refused to take the property. (See, also, Scott v. Stuart, 115 Ill. App. 535, 539; Carter v. Simpson, 130 Ill. App. 328, 330; Schulte v. Meehan, 133 Ill. App. 491, 500.)

Other points are argued as reasons for a reversal of the judgment. No useful purpose will be served by discussing them. Suffice it to say we have considered them all and are of opinion that no error, prejudicial to the defendant, was committed by the trial court.

Accordingly, the judgment of the Municipal Court is affirmed.

AFFIRMED.

118 - 20034

VOIGHTMAN & COMPANY, for the use of Watson Solar Window Company,
Defendant in Error,

vs.

GUARANTY CONSTRUCTION COMPANY, a corporation, and E. F. HAMM,
Plaintiffs in Error.

Error to Municipal Court of Chicago.

190 I.A. 122

STATEMENT OF THE CASE. On April 25, 1913, Watson Solar Window Company (hereinafter referred to as the Watson Co.) commenced an action of the fourth class in the Municipal Court of Chicago against Guaranty Construction Company, a corporation (hereinafter referred to as the Construction Co.), and E. F. Hamm, to recover the sum of $236. The action was based upon section 38 of the Mechanics' Lien act of 1903, which provides, inter alia, that a sub-contractor "may sue the owner and contractor jointly for the amount due him in any court having jurisdiction of the amount claimed to be due, and a personal judgment may be rendered therein as in other cases." In the statement of claim as originally filed it was alleged, substantially, that the Watson Co. had installed certain art metal doors in a building in Chicago belonging to the defendant, E. F. Hamm, in accordance with a contract made by and between the defendant, Construction Co., and the plaintiff, Watson Co., "by Voightman & Co., its selling agents"; that said contract made by Voightman & Co. was made for the use of plaintiff and belonged to plaintiff and was performed by plaintiff with the knowledge of defendants; that said contract consisted of a proposal and an acceptance; that the proposal was sent by plaintiff, through said Voightman & Co. to Perkins, Fellows & Hamilton, architects for said building, and was as follows: "Nov. 13, 1912. We propose to furnish, deliver and erect twelve (12) single and one (1) pair of doors in

our standard hollow art metal construction, given a priming coat of paint, complete with three way locks, Rixon door checks, butts and other shelf hardware in Bower Barff finish, for the net sum of $686. The doors * * are to be single panel doors, and are to have underwriters' approval. (Signed) Voightman & Company"; that the acceptance was sent by the defendant, Construction Co., addressed to said Voightman & Co., and was as follows: "11-13-1912. We accept your proposal to furnish, deliver and erect 12 single, 1 pair of doors, Standard Hollow art metal construction for building located at 418 S. Market St., and belonging to Blakely Printing Co., everything specified and shown on plans drawn by Perkins, Fellows & Hamilton, architects, for the sum of $686. * * Please notify us immediately if there is any variation whatsoever in the contract between us from the terms of this written acceptance. (Signed) Guaranty Construction Co., by C. H. Borden, V. P."; that the work was completed in accordance with said contract on or about December 31, 1912, and that there is now due and unpaid on said contract the sum of $686; that on February 28, 1913, it caused to be served on defendant, E. F. Hamm, a mechanic's lien notice (copy thereof was attached to the statement of claim and made a part thereof); that said E. F. Hamm is the owner of the premises on which said doors were installed under said contract, and that the said Hamm is liable therefor as by statute provided. The copy of the attached lien notice was as follows: "To E. F. Hamm. You are hereby notified that the Watson Solar Window Co. have been employed by Guaranty Construction Co. to furnish material - one pair art metal doors and twelve single art metal doors, per contract of Nov. 4, 1912, under the contract with you on your property described as follows: Bldg. 412 to 430 S. Market St., Chicago (also giving a legal description); and that there was due the Watson Solar Window Co., on December 31, 1912, therefor the sum of $686, and that I shall hold the buildings and your interest in the grounds liable for the amount that is due me on account thereof. Dated February

28, 1913. (Signed) Watson Solar Window Co., by W. D. Watson, President."

The defendants entered their appearance and each filed an affidavit of merits. The Construction Co. denied that it had had any dealings whatsoever with the Watson Co. or that it was indebted to that company in any sum.

On June 13, 1913, on motion of plaintiff, an order was entered that the "records, papers and proceedings" be amended by changing the name of plaintiff wherever there found to read "Voightman & Company for use of Watson Solar Window Company," that plaintiff be given leave to file an amendment to the statement of claim instanter and that defendants have five days to file affidavits of merits. Plaintiff filed the amendment, changing the name as above but made no further amendment. Each defendant filed an affidavit of merits to plaintiff's amended statement, but the court deemed the same insufficient and ruled that each defendant file a more specific affidavit. The affidavit of the defendant Hamm, as finally filed, alleged that "while certain art metal doors were installed upon the premises of this defendant at 418 S. Market street * * this defendant has no knowledge by whom said doors were installed"; that he has been informed that said Construction Co. accepted of said Voightman & Co. a certain proposal made by it to said architects to install upon the property of this defendant certain metal doors but he has no knowledge of the relation between the Voightman Co. and the Watson Co., and demands strict proof thereof; that he denies that there was served upon him a mechanic's lien notice "as is required by law to enable the plaintiff to maintain its action"; and that prior to the acceptance by the Construction Co. of the proposal of the Voightman Co. this defendant entered into a contract with the Construction Co., whereby that company waived and released any and all liens upon said premises on account of labor or materials furnished or to be furnished by the Construction Co. Plaintiff moved that this affidavit of merits, filed by de-

fendant Hamm, be stricken from the files, but the motion was denied. In the affidavit of merits of the Construction Co., eliminating those portions stricken out by the court, said defendant denied that it had promised and agreed to pay plaintiff the sum of $686, and also denied that it was "liable jointly with the other defendant in this cause."

The cause was tried before the court without a jury, and the court on October 25, 1913, found the issues in favor of plaintiff and assessed its damages at $714.82 (being full amount of plaintiff's claim and interest), and further found that plaintiff had established its right to a lien upon certain premises (describing them), that said premises were owned by E. F. Hamm, that the Guaranty Construction Co. was contractor under contract with said Hamm, as defined in the Mechanics' Lien act, that the plaintiff was a sub-contractor, as defined by said act, and entitled to a lien upon said premises, under the provisions of said act, for the sum of $714.82, for material and labor furnished, and that said lien attached on December 31, 1912. On the same day the court entered judgment upon the finding, adjudging that plaintiff "have and recover from the defendants, Guaranty Construction Co., a corporation, and E. F. Hamm, the sum of $714.82, and costs of this suit, and that plaintiff have a lien for said amount upon the following described premises (describing them); that said lien attached on said premises on December 31, 1912, and that plaintiff have execution," etc.

MR. JUSTICE OPIDLEY DELIVERED THE OPINION OF THE COURT.

The defendants by this writ seek to reverse the judgment and contend that the finding is not warranted by the evidence and that the court erred in entering judgment against both defendants. We are of the opinion that said finding was not justified by the evidence and that the trial court erred in adjudging that the plaintiff, Voightman & Co., have a lien on said premises, and entering a joint judgment against said defendants.

By section 24 of the Mechanics' Lien act of 1903 it is provided in part as follows:

"Sub-contractors, or party furnishing labor or materials, may at any time after making his contract with the contractor, and shall within sixty (60) days after the completion thereof, * * cause a written notice of his claim and the amount due or to become due thereunder, to be personally served on the owner or his agent or architect, or the superintendent having charge of the building or improvement. Provided, such notice shall not be necessary when the sworn statement of the contractor or sub-contractor provided for herein shall serve to give the owner notice of the amount due and to whom due."

By section 38 of said act, under which the present action was brought, it is provided in part as follows:

"If any money due to the laborers or sub-contractor be not paid within ten (10) days after his notice is served, as provided in sections five (5), twenty-four (24), twenty-five (25) and twenty-seven (27), then such person may * * sue the owner and contractor jointly for the amount due him in any court having jurisdiction of the amount claimed to be due, and a personal judgment may be rendered therein, as in other cases. In such actions at law, * * the owner shall be liable to the plaintiff for no more than the pro rata share that such person would be entitled to with other sub-contractors out of the funds due to the contractor from the owner under the contract between them, * * and such action at law shall be maintain (maintained) against the owner only in case the plaintiff establishes his right to the lien. All suits and actions by sub-contractors shall be against both contractor and owner jointly, * * . All such judgments, where the lien is established, shall be against both jointly, but shall be enforced against the owner only to the extent that he is liable under his contract as by this act provided, and shall recite the date from which the lien thereof attached * * ; but this shall not preclude a judgment against the contractor, personally, where the lien is defeated."

By section 33 of said act it is provided that the suit at law to enforce the lien shall be commenced "within four months after the time that the final payment is due the sub-contractor,

laborer or party furnishing material."

The present suit was commenced on April 25, 1913, by the Watson Co. By the amendment of June 13th Voightman & Co. became the plaintiff. It was alleged in the statement of claim, in substance, that on or about November 13, 1912, by means of a writ-proposal by Voightman & Co. and a written acceptance by the Construction Co., the former agreed to install certain metal doors on certain premises mentioned for the sum of $686; that the premises were owned by E. F. Hamm; that the work of installing the doors was completed on or about December 31, 1912; that no part of said sum of $686 had been paid by the Construction Co.; and that on February 28, 1913, there was served on said Hamm a mechanic's lien notice signed by the Watson Co., wherein it was stated, in substance, that the Watson Co. had been employed by the Construction Co. to furnish certain metal doors on said premises and that there was due to the Watson Co. on December 31, 1912, the said sum of $686. In the affidavit of merits, as finally filed, of the defendant Hamm, it was in effect admitted, we think, that he was the owner of the premises in question, that the plaintiff, Voightman & Co., had made a proposal to the Construction Co., which had been accepted by the latter, for the installation of certain metal doors on said premises, that certain metal doors had been installed on the premises, and that prior to the making of said proposal and acceptance he (Hamm) had entered into a contract with the Construction Co. for the furnishing of labor and materials on said premises, but this was all that was in effect admitted by Hamm. He denied that a sufficient lien notice had been served upon him by the plaintiff (i.e. Voightman & Co.) to enable it to maintain its action, and alleged that he did not know who installed said iron doors on the premises and had no knowledge of the relations existing between Voightman & Co. and the Watson Co., and that by the terms of his contract with the Construction Co., that company waived and released any and all liens for labor or materials fur-

nished or to be furnished by it on said premises. In the affidavit of merits of the Construction Co., as finally filed, that company denied that it was jointly liable with the defendant, Hamm, in the present action.

From the stenographic report of the proceedings at the trial contained in the transcript, it appears that the plaintiff and the defendants were each represented by counsel. Neither of the defendants introduced any evidence. On behalf of the plaintiff it was shown by the witness, Moe, that he personally served upon the defendant, Hamm, on February 26, 1913, the mechanic's lien notice, as set forth in plaintiff's statement of claim. The attorney for defendants objected to its admission because it was a notice given by the Watson Co. and not by Voightman & Co., the plaintiff, but the objection was overruled and the notice admitted in evidence. The written proposal and the written acceptance, as set forth in plaintiff's statement of claim, were offered and received in evidence. W. D. Watson, president of the Watson Co., testified that he had a telephone conversation with defendant Hamm some time in January, 1913; that he asked Hamm "about our bill for those doors"; that Hamm replied that "he had nothing to do with it," that the Construction Co. had the contract and were supposed to pay the bill; that some time in February, 1913, he (Watson) had another telephone conversation with Hamm, in which the latter said that he did not want a lien on his building, that he had seen an officer of the Construction Co. and that said officer had informed him that the bill for the doors would be fixed up shortly. H. C. Keenan, bookkeeper for the Watson Co., testified to making several calls at the office of the Construction Co. during January and February, 1913, and receiving promises that the bill for the metal doors would soon be paid. This was substantially all of the evidence introduced upon the trial.

A mechanic's lien is in derogation of the common law, is opposed to common right, and cannot be given except when auth-

orized by the provision of a statute strictly construed. A party seeking to enjoy the advantages of the statute must bring himself strictly within its terms. (Williams v. Rittenhouse & Embree Co., 192 Ill. 502; Everson & Son v. Smith, 152 Ill. 641; Huntington v. Barton, 64 Ill. 502.)

By the provisions of section 28 of the act, the authority of the trial court in the present case to enter a joint judgment against Hamm and the Construction Co. depended on the plaintiff, Voightman & Co., establishing its right to a lien on the premises. By said section, also, if any money due Voightman & Co., as a sub-contractor, was not paid within ten days after its notice was served, as provided in sections 5, 24, 25 and 27 of said act, Voightman & Co. could then bring its suit against the owner and contractor jointly. But the evidence failed to disclose, and it was not admitted, that Voightman & Co. had served on Hamm a notice, required by section 24 of the act, within 60 days after the completion of its contract, or at any time, and it was not shown that any sworn statements had been given Hamm, dispensing with the necessity of such a notice. The evidence also failed to disclose when the contract was in fact completed. And, even assuming, for the purpose of argument only, that the written notice given to Hamm by the Patson Co. on February 22, 1913, was as effective as though given by Voightman & Co., still there was no evidence showing that said notice was given within 60 days after the metal doors were installed and the contract completed; and, furthermore, there was no evidence showing that, when said notice was given, Hamm, the owner, was indebted or thereafter became indebted to the Construction Co., original contractor, in any sum. Evidence of this fact was necessary. (Elkins v. Fehillinger, 181 Ill. App. 371; Merritt v. Crane Co., 196 Ill. App. 337, 348.) Furthermore, the evidence failed to show that when the present suit was commenced, viz., April 25, 1913, it was commenced within four months after the time that final payment was due Voightman & Co., as sub-con-

tractor. (Huntington v. Barton, supra; Green & Lombard Co. v. Bain, 77 Ill. App. 17.) It did not appear when said final payment was due.

Counsel for plaintiff contend in their brief that by certain rules of the Municipal Court, in force when the present cause was begun and tried, it is provided that evidence of only such defenses as are set out in defendant's affidavit of merits shall be admitted at the trial, and that every allegation of fact in any statement of claim, if not denied specifically or by necessary implication in the affidavit of defense, shall be taken as admitted, etc., and that the trial court, under the pleadings and the evidence and the application of said rules, was justified in the finding. It is a sufficient answer to this contention to say that said rules are not incorporated in the transcript before us and that this court cannot take judicial notice of the rules of the Municipal Court. (Sixby v. Chicago City Ry. Co., 260 Ill. 478; Mann v. Brown, 263 Ill. 394; Jazzla v. Nagla, 183 Ill. App. 237, 240.)

For the reasons indicated the judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

38

486 - 12868.

BENJAMIN J. ROSENTHAL and LOUIS ECKSTEIN, Appellees, vs. BOARD OF EDUCATION OF THE CITY OF CHICAGO, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

190 I.A. 167

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

A bill was filed by Benjamin J. Rosenthal and Louis Eckstein, appellees, against the Board of Education of the City of Chicago, appellant, seeking to enjoin the enforcement of an appraisal of the value of Lot thirty-one (31) in Block one hundred forty-two (142), in School Section Addition in Chicago, made by John McLaren, Arba N. Waterman and William D. Kerfoot, as appraisers, under two leases, - an original and a so-called supplemental lease. The appraisal was made for the purpose of determining the rental to be paid under the terms of said leases for the period of ten years from May 1, 1903, until May 1, 1913.

The decree entered by the chancellor on the hearing, although not granting the specific relief prayed for in complainants' bill, set aside the appraisal and fixed the value of the premises in question and the rental to be paid thereon. The rental fixed was much less than that found by the appraisers. Errors and cross-errors are assigned.

This is the third case to come before us involving the school fund lease 1903 appraisement cases. There were twelve bills filed in all by twelve different lessees. Two of these, the Sebree and the Farwell cases, were decided by this court decreeing that the bills be dismissed for want of equity. (Sebree v. Board of Education, 186 Ill. App. 276).

The decree of this court was affirmed by the Supreme Court. (Sebree v. Board of Education, 254 Ill. 438).

The issues in all of the bills filed, in so far as they affect the validity of the appraisal, were identical, and also the substantive evidence to sustain and defeat the issues presented, with this exception, - that in this case and in the case involving the appraisement of Lot 32, a single additional issue is raised, namely, the effect of the appraisers' reporting in a lump sum the separate appraisements which they actually made on Lots 31 and 32. This is the only matter, therefore, in our opinion, open for determination as all the other questions raised by the pleadings and evidence have been finally adjudicated adversely to the complainants in the Sebree and Furrell cases. We shall state, therefore, only the pleadings and facts relating to the appraisal in one parcel of two lots leased by two separate leases.

The property in question is situated in the city of Chicago on the west side of State street, midway between Madison and Monroe streets, and just south of and abutting on the public alley running east and west between State and Dearborn streets in that block. The lot involved in this case, 31, has a frontage of 24 feet upon State street by a depth of 120 feet to a 15-feet public alley.

On or about May 8, 1880, the Board of Education of the city of Chicago leased lot 31 to Robert A. Sheppard for a period of fifty years under the lease spoken of in this record as the "original" lease. By the terms of the original lease the annual rental for the first five years was fixed at $2,376. After May 8, 1885, the annual rental thereunder was fixed as follows:

Within three months before May 8, 1885, the Board of Education of the city of Chicago was to appoint three discreet male residents, freeholders, of said city, to determine,

under oath, the true cash value of the demised premises at the time of such appraisal, not taking into consideration the improvements on the lot, which said valuation was to be signed and certified within the three months referred to and filed in the office of the clerk of the Board of Education of the city of Chicago, and upon such valuation so determined was to be calculated six per cent. thereof, the product of which should be the yearly rent reserved upon the above described premises for the term of five years commencing on May 8, 1885, and ending May 8, 1890.

It was further provided in the lease that for each term of five years thereafter appraisers should be appointed by the Board of Education in like manner, and that valuations and assessments should be made by such appraisers and similar calculations of six per cent. should be made upon the valuation of the said premises which should be taken as the yearly rent of the premises during these various five year periods.

Under the terms of the lease all personal notice of the appointment of appraisers was waived and the lessee was estopped from objecting in any way to their appointment, unless such objection was made in writing to the Board of Education within thirty days after their appointment. It was further provided that the lessee should be estopped from objecting to any matter connected with their actions unless objection was made in writing to the Board of Education, and filed with the clerk of the Board within thirty days after the filing of the valuation or appraisement in the office of the clerk of the Board. The rent was payable quarterly in advance, in May, August, November and February in each year. It was further provided in the lease that no assignment thereof should be valid, or be final or binding, or conclusive against said party of the first part thereto until said party of the second part should notify said party of the first part in writing of such assignment.

The lease further provided that in case an assignment should be made, the assignee was to be subject to the same terms and conditions as to further assignments and to all covenants and conditions of the lease. It was provided also that none of the covenants or agreements should be waived or forfeited by the act of any collector, employe or agent, nor in any manner except by the action of the Board of Education at a regular meeting thereof.

In 1884, there was a valid assignment of the lease to Frederick Haskell, and, afterwards, in accordance with the provisions of the lease, on February 25, 1885, the Board of Education of the city of Chicago duly undertook to have an appraisement made of the property. Litigation ensued after the appraisement had been made and after proceedings had been pending for some time, about June 15, 1888, a compromise was effected between the litigants, and, pursuant thereto, a supplemental lease was made, dated June 15, 1888, and executed between the parties. The supplemental lease provided substantially as follows:

1. That the term of said lease of May, 1880, should be and was thereby extended to May 8, 1985, subject to the provisions of the lease and supplemental lease.

2. That the appraisal of lot 31, made in the year 1885, was ratified and confirmed.

3. The appraisement period was increased from five to ten years, thereby causing the next appraisal to be made in the year 1895.

The supplemental lease further provided that in lieu of the method of appointing appraisers provided in said original lease, appraisers should in future be appointed as follows: The Board of Education of the city of Chicago, any judge holding the Circuit Court of the United States in

and for the Northern District of Illinois for the time being, and the judge of the Probate Court of Cook County, Illinois, or the successor of said court having probate jurisdiction for the time being, should each appoint one discreet male resident of the city of Chicago, not interested as lessee or mortgagee of school property in said city, to determine, under oath first duly taken, the true cash value of said demised land at the time of such appraisal, exclusive of the improvements thereon; that the person appointed by the Board of Education should be the chairman of said appraisers and should call their meetings and preside thereat.

Then follow certain provisions for the appointment of successors to the appraisers, in case they should die or resign, neglect, omit or refuse to act, not important to be here mentioned.

The fifth provision of the supplemental lease provided that the persons appointed under said supplemental lease to fix and determine the value of the leased land should at all times and under all circumstances be held to be appraisers and not arbitrators, and should not be bound to give notice of their meetings or proceedings to the parties to the lease, except as therein expressly provided, namely:

(a) Upon their appointment the appraisers should cause a notice of the fact to be sent by mail addressed to the lessee.

(b) Within twenty days after the mailing of said notice, the lessee might file with the appraisers a written statement or argument for their information, and should at the same time furnish a copy of the same to the lessor.

(c) Within twenty days after the receipt of such statement or argument by the lessor, it might cause to be filed with the appraisers a statement or argument in writing, a copy of which should be furnished to the lessee.

(d) The lessee might file a reply to the statement or argument of the lessor within ten days after receiving such copy.

(e) The sole purpose of the four preceding provisions was to allow the parties to present to the appraisers information within their possession and their views concerning the value of the demised lands, but it was expressly declared to be understood and agreed that the appraisers should not be concluded in any event by the statements so made, but should be at liberty to seek or obtain such information as they deem pertinent, either with or without notice to the parties, and to make their appraisal upon all the facts within their knowledge, notwithstanding anything contained in the written statements above provided for.

Then follow sundry provisions in the supplemental lease in relation to the appointments to be made for filling vacancies among the appraisers and details in making and reporting appraisements.

Section 8 of the supplemental lease provided that should there be, for any cause, a failure in making an appraisement in any year or years wherein an appraisement should be made under and according to the terms of the lease and the supplemental lease, the amount of annual rent to be paid by the party of the second part for the ensuing period of ten years should not be rendered uncertain or undetermined by reason of such failure in making an appraisement, but the sum to be paid as annual rent for and during the period of ten years from the eighth day of May in any year when an appraisement should be made and failed to be made, should be the same as that paid or reserved as rent during the last preceding period of ten years prior to said eighth day of May, and that no covenant in said lease or in the supplement thereto should in any way be affected, waived or impaired by the failure to make such appraisement, or either of them.

It is further provided in Section 10 of the supplemental lease that the covenants and agreements therein contained should bind the respective successors, heirs, representatives, administrators and assigns of said parties and, except as thereinbefore expressly changed or qualified, said lease should stand and be in full force and effect according to its terms as originally executed and delivered.

In January, 1891, the lessee, Haskell, assigned his interest in the original and supplemental leases of lot 31 to David L. Strecter, and notice thereof was duly given to the Board of Education.

As set forth in the bill of complaint, on February 20, 1895, John McLaren was duly appointed one of the three appraisers provided for in Section 4 of the supplemental lease. On March 6, 1895, Guyon Carnett was appointed by the judge of the Probate Court of Cook County to act as an appraiser, and Judge Grosscup, holding the Circuit Court of the United States in and for the northern district of Illinois, appointed Eugene Cary as the third appraiser, pursuant to the terms of the original and supplemental leases.

An appraisal was reported on May 28, 1895, by the above named appraisers to the Board of Education, as a result of which the value of lot 31 was ascertained and fixed at the sum of $165,000, making the annual rental therefor, under the terms of the original and supplemental leases, the sum of $9,900, which sum so ascertained and determined was accepted by both parties to the lease and is the amount which has been paid as rental for said lot 31 under the lease for the period beginning May 9, 1895, and ending May 9, 1905. The lessee Strecter assigned his interest in the lease to Otto Young, who, in turn, in July, 1902, assigned the same to Benjamin J. Rosenthal, Louis Rehstein and Louis M. Stamer, who gave due notice thereof, as provided in the lease, to the Board of Education.

It is an admitted fact in the record that subsequent to the notice of the assignment from Otto Young to Rosenthal, Eckstein and Stumer, no notices, as specified in the leases, have been given to the Board of Education of any further assignments of the leases in question. Lots 31 and 32 (which adjoins lot 31 on the south) are held under leases from the Board of Education identical in terms, except as to the amounts of rent to be paid. The lessee of the two lots has been the same person since 1891. The notice which Otto Young gave the Board of his assignment from Streeter in 1893 and the notice given to the Board by Benjamin J. Rosenthal, Louis Eckstein and Louis M. Stumer, of their assignment from Young on July 1, 1902, are identical in form as follows:

"To the Board of Education of the City of Chicago.
You are hereby notified that I have assigned to Louis M. Stumer, Benjamin J. Rosenthal and Louis Eckstein, of the city of Chicago, my leasehold estate in Lots thirty-one and thirty-two (31 and 32), in Block one hundred forty-two (142), in School Section Addition to Chicago, County of Cook and State of Illinois, which leasehold estates exist under two certain leases made by the Board of Education of the City of Chicago, bearing date the 5th day of May, 1890, one to Robert D. Sheppard and the other to Thomas C. Otis, and the supplements thereto.
Otto Young.
Chicago, July 1st, 1902."

The record shows that these three lessees, Stumer, Rosenthal and Eckstein, were State street merchants, doing business as partners on lots 31 and 32, under the firm name of Stumer, Rosenthal & Eckstein, from 1891 to 1903, when their business was incorporated under the name of the Emporium World Company. The quarterly rent of both lots was paid by them in lump sum from the date they became lessees until the 1905 appraisement, complained of in the bill, was made, and receipts were given to them in the same manner, the checks being for $4,725 each, (the sum of the quarterly rental of both lots), and signed by "Stumer, Rosenthal & Eckstein, per Louis M. Stumer", or "Emporium World Millinery Co., per Louis M. Stumer, Pres. & Treas.," and the receipts reading:

"$4725.00 Chicago, August 8, 1900.
Received of Stumer, Rosenthal & Eckstein Forty-seven Hundred Twenty-five Dollars for rent L. 31 & 32, Block 142, Sch. Sec. Addition for three months ending November 7, 1900.
Board of Education of the City of Chicago.
Per L. E. Larson,
Sec."

The above was the first receipt given to Stumer, Rosenthal & Eckstein, and this form of receipt was followed for three years, up to the appraisement complained of, and was accepted by the three lessees of lot 31 without complaint or notice of any kind that there had been another assignment of the lease. The last receipt given before the appraisement complained of was as follows:

"$4725.00 Chicago, Feb. 8, 1905.
Received of Stumer, Rosenthal & Eckstein Forty-seven Hundred Twenty-five Dollars for rent L. 31 & 32, Block 142, Sch. Sec. Addition for three months ending May 7, 1905.
Board of Education of the City of Chicago,
By L. E. Larson, Secretary."

The bill of complaint sets up that Benjamin J. Rosenthal and Louis Eckstein, the complainants, had at the same time that they, with Louis N. Stumer, received the assignment from Otto Young July 1, 1902, assigned their interest in the lease on lot 32 to Louis N. Stumer, and that Stumer at the same time had assigned his interest in lot 31 under said leases to the complainants. The bill does not set up that any formal notice was given to the Board of Education of these latter assignments, but claims an estoppel against the Board of Education because fifteen months later, though they were regularly accepting receipts as above mentioned made to the three of them, their attorney had written a letter to a committee of the Board on an entirely foreign subject, - that of attempting to secure, in connection with other lessees in Block 142, a modification of the leases by eliminating the revaluation clause - in which letter he had incidentally mentioned that, "We represent Benjamin Rosenthal and Louis Eckstein,

who are the lessees of Lot 31 in Block 142, School Section Addition, and Louis N. Stuner, who is the lessee of Lot 38 in said Block 142, under leases from the Board of Education*****
*** As evidence of the good faith of this application, we herewith hand you the check of Messrs. Rosenthal & Eckstein for $240, and the check of Mr. Louis N. Stuner for $240, being a deposit of $10 per front foot of each of the above described parcels of land, upon the understanding that said sums are to be used for obtaining expert opinions as to the value of said real estate as a basis for determining the rental thereof."

The complainants also claimed an estoppel because in the fall of 1903 and winter of 1904, Merrill, as one of the many representatives of the lessees, appeared before a committee of the Board and had various consultations with the President of the Board, Harris, in reference to the modification of all the revaluation leases existing in Block 142, by striking out the revaluation clause. Merrill could not say, however, that in these consultations he had specified the separate interests in the two lots. The efforts of the various lessees to secure a modification proved ineffectual and the deposits were returned to them.

Such was the situation existing at the time the appraisement in 1905 was made. The appointment of the appraisers was made as set forth in the Nehring case. They took the oath of office and notified the complainants of their appointment. A list of properties to be appraised was duly attached to the oath taken by the appraisers, and in that list appears the lot in question, described as 156-158 South State street, east front, alley on north of Lot 31; Lots 31 and 37, Block 142, School Section Addition. Stuner, Rosenthal and Eckstein were named as the owners of the leases. On April 18, 1905, complainants filed a protest against the appointment of the appraisers. This protest was absolutely

silent on the matter of joining the two lots in one description and so under one ownership.

After the appraisers qualified by taking the oath, they proceeded to make the appraisement, having notified the lessees of their appointment, and the complainants availed themselves of the opportunity given by their lease to file an argument through counsel for the complainants in this case, the argument covering numerous properties involved in the appraisement as well as the properties of complainants; and one of counsel for complainants obtained the privilege to make an oral argument before the appraisers, in which he called attention to the fact that the leasehold of lot 31 was in complainants Rosenthal and Eckstein, and that the leasehold of lot 32 was owned by Stumer. After hearing the arguments, oral and written, on both sides, the appraisers proceeded to value the property, and, according to the testimony of the appraisers, which appears in the record, they, in fact, appraised lot 31 at $324,000, and fixed the value of the adjoining lot, 32, at the sum of $312,000, and fixed the appraisement on the two lots at the sum of these two amounts, namely, $636,000. The report of the appraisement made by the appraisers made no mention of the separate appraisement of the lots, but speaks of them as leased by the Board of Education to Stumer, Rosenthal and Eckstein.

Under the lease, the complainants filed a protest with the Board of Education. This protest is set out as Exhibit "D" attached to the bill of complaint. In no part of the protest was there any reference made to the failure to make the appraisement separately as to lot 31 and lot 32, and no objection was made to the appraisement as reported in the lump sum of $636,000 for the two lots; nor was there any protest made against the recital that the two lots were leased by the Board of Education to Rosenthal, Stumer and Eckstein.

Appellees' bill of complaint sets up certain facts and proceeds upon the theory or hypothesis that the appraisers made no appraisement of the value of lot 31 in accordance with the provisions of the original lease and the supplemental lease; that the joint appraisement of lots 31 and 32 as a tract or parcel of land is not an appraisement of lot 31, and that there is no authority in the lease therefor, and, therefore, the action of the appraisers is void and of no effect. That being the case, the bill invokes the provision of the lease which covers the failure for any cause in making an appraisement, in which event the amount of the annual rent for the ensuing ten years shall be the same as for the prior period of ten years; and prays that the appellant be enjoined from attempting in any manner to collect from the complainants on account of rent for lot 31, any greater sum than $9,900 per annum, etc., specifying the special relief desired, and prays that the complainants may have such other and further relief as equity shall require and to the court may seem meet.

The answer of appellant to the bill admits the lease and supplemental lease, the appraisement of 1895, fixing the annual rental for the ten year period ending May 8, 1905, at $9,900; the assignment by Streeter to Young, and that notice thereof was given to appellant, and that on July 1, 1902, Young assigned to Stumer, Rosenthal and Eckstein and due notice thereof was given to appellant, but avers that it had no knowledge that the leases had ever been assigned or transferred

by the last named parties or either of them, and that appellant never received any notice in writing of any assignment by said last named parties and sets up the provision of the lease making assignments thereof invalid and not binding on appellant until notice in writing is given to appellant, and claims that the complainants are not its lessees under the leases and are not entitled to any relief in equity. The answer then sets up the appointments of the appraisers in 1905; the making of the appraisement, and denies that Stumer, Rosenthal and Rokstein made any objection in writing to any matter or thing or proceeding connected with the appointment of the appraisers or their qualification or action as such appraisers; and denies that said lessees ever caused any such objection to be filed with the clerk of the Board of Education. The answer avers that the complainants addressed to the appraisers certain objections, a copy of which is attached to the bill of complaint marked Exhibit "C", but that they abandoned such objections by appearing through their attorneys before the appraisers and voluntarily recognized them as appraisers and recognized their due and proper appointment and qualification and their right to make the appraisement provided for in the leases. The answer then sets up the appraisement of Lot 31 by the appraisers as a single separate lot at the sum of $134,000. The answer sets up the contiguous location of lot 30 to lot 31, and that in January, 1891, David L. Streeter acquired the interests of the lessees of both lots under similar leases and that continuously since that date, and up to the present time, the leases covering both lots have been held in identical hands and that the leases ownership has become merged and is held and owned by Stumer, Rosenthal and Rokstein, and for that reason the appraisers in making their report of said appraisement included the value of both lots in a lump sum, although, as a matter of fact, they appraised each lot separately.

Upon a consideration of the pleadings and the evidence, we think there is no equity shown in the bill or proof, and, therefore, the decree must be reversed and the bill dismissed.

The Circuit Court, by setting aside the appraisement and making a new appraisement of the lot in question, granted a relief which was not sought by either of the parties to the bill, and which was not warranted by the pleadings in the case. The relief granted was not in conformity with the averments and prayer of the bill, and the answer contains no averments which afford a foundation for the decree, and if it did contain such averments, they would not, in the absence of a cross-bill, form a basis for obtaining relief. (Mehan v. Mehan, 203 Ill. 188; Johnson v. McNellis, 238 id. 353; White v. White, 103 id. 438). It is a fundamental principle in equity pleadings and practice that the allegations of the bill, the proof, and the decree must correspond. The chancellor could not make a new appraisement or report on the facts averred in the bill.

The conduct of complainants in notifying the Board of Education of the assignment of the leases covering both lots to Stumer, Rosenthal and Eckstein and in occupying both lots jointly for their firm business, (which they subsequently incorporated) and in paying the rents of both lots in lump sums from the date they became lessees until the making of the 1905 appraisement complained of, without giving the Board any notice in writing of any transfers of the leases between themselves, constitutes an equitable estoppel against any relief of the character sought by complainants. This line of conduct was calculated to convey to the Board the knowledge and belief that the leasehold estates in the two lots had been merged into one holding for the purpose of conducting the enterprise or business occupying the premises. This is

evident from the manner in which the quarterly payments were made and the receipts for the same were given. It is clear, we think, that it would be inequitable to allow complainants relief when they made no point in their protest as to the transfers between themselves until after the appraisement under the leases had been entered upon and completed, and then, after the time for correcting the appraisement allowed by the leases had passed, raise the point of a bulk appraisement for the lots so used and occupied for the purpose of defeating the appraisement. Moreover, the leases by the provision above referred to expressly create the estoppel by providing, as the bill asserts, that the lessees and their assigns shall be estopped from objecting to any matter connected with the action of the appraisers unless such objection shall be made in writing to the Board of Education and filed with the clerk of the Board within thirty days after the filing by the appraisers of such valuation or appraisement in the office of the clerk of the Board. The objection or protest which complainants filed on June 21, 1905, as set forth in their bill, made no reference to the joint appraisement of lots 31 and 32 as one piece, or the failure to appraise each lot separately. So that the bill itself shows that complainants are estopped from objecting to the joint appraisal of lots 31 and 32 by their failure to object on that ground within the thirty days given them by the leases.

Complainants do not come into court offering to do equity. They do not offer to pay an equitable amount of rent to be ascertained by a new appraisal by the court or under its direction. They invoke the provision of the leases relating to a failure for any cause in making an appraisement in any year or years wherein an appraisement should be made, to the effect that the amount of the annual rent to be paid by the tenants for the ensuing ten years shall be the same as for the last

preceding period of ten years which was $8,000, and ask that the Board be restrained from attempting to collect from complainants on account of rent any greater sum than $8,000, and other specific relief to that end. They do not ask that the report of the appraisers be reformed according to the facts and offer to pay rental in accordance therewith.

In the Sebree case it was held:

"As long as appraisers act honestly and in good faith, they have a wide discretion as to their methods of procedure and source of information. Their conclusions, in the absence of fraud or mistake, will be binding upon the parties."

Furthermore, complainants do not show that by their bill or proof they are in any manner or to any extent injured by the appraisement as reported. They, with Stumer, have for years occupied the two lots as a single piece of property for a certain business owned and conducted by them, and have paid the rental therefor in one lump sum and accepted receipts therefor in the name of the three lessees (not according to the alleged ownership), and without notifying the Board of their separate holdings of the leases, presumably for their own convenience and benefit. Hence, they have shown no injury from an appraisement as a single piece of property in accordance with their use, occupation and treatment of the same. And they cannot complain that the Board treated them as owners of a single piece of property and listed the property as such, treating them as joint tenants of both lots.

The decree is reversed and the cause is remanded with directions to dismiss the bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

515 - 19920.

FRED MILLER BREWING COMPANY,
Appellant,

vs.

GEORGE JONES and JACOB PORTZ,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

190 I.A. 169

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

A judgment by confession for $1064.30 against George Jones and Jacob Portz, Jr., in favor of the Fred Miller Brewing Company was entered by the Circuit Court of Cook County, on a nary and cognovit August 18, 1911. Upon motion made by both defendants, leave was given by the court to the defendants to plead to the declaration, and the cause was set upon the trial calendar of the court to be heard upon its merits, the judgment to stand as security. A plea of general issue was filed by both defendants.

The cognovit, on which the judgment was rendered, was based on a power of attorney to confess judgment at any time thereafter, embodied in the note, signed by both defendants, which was dated April 28, 1911, for $1,000 due on demand, payable to the order of Fred Miller Brewing Company, with interest at five per cent, after date until paid. The warrant of attorney authorized confession of judgment for such an amount as might appear to be unpaid thereon, together with costs and $50 attorneys' fees.

The jury returned a verdict finding the issues for the defendants, and judgment was entered on the verdict. From that judgment the plaintiff prosecutes this appeal.

From the record it appears that the defendants were the lessees of the premises at 2834 West 22nd street, Chicago. They proposed to the plaintiff, a corporation engaged in the brewing business in Chicago, that upon certain

conditions, including the loan to them of $1,000, they would use exclusively in their saloon business the draught beer manufactured and sold by the plaintiff. This proposal was accepted by the plaintiff and a contract was entered into between the plaintiff and defendants, in which it was agreed: (1) that the plaintiff would sell to the defendants all the malt liquor which they might need, use, sell, consume or give away upon the said premises at the following prices, cash on delivery: the brand known as "High Life," $8.00 per barrel; brand known as "Pilsener," $5.00 per barrel; and bottled beer at said first party's market price. (2) That the plaintiff would loan to the defendants the sum of $1,000 to be secured by their judgment note payable on demand and would also loan the defendants sixty tables and 240 chairs. The defendants agreed to purchase from the plaintiff and pay therefor at the prices above mentioned all the draught malt liquor and eighty per cent. of the bottled beer used, sold, consumed or given away by the defendants upon the premises during the period of the agreement; and further agreed to maintain a saloon on the premises during the period of the agreement. It was further agreed that in the event that the defendants fully complied with all the terms and conditions of the agreement, then, upon the expiration of the agreement by lapse of time, the plaintiff would deliver up to the defendants the note for $1,000 and cancel the indebtedness. The agreement was to be in full force and effect to and including the 31st day of October, 1913. The agreement was in writing and duly signed by plaintiff and defendants.

At the time of the execution of the agreement, the note sued on for $1,000 mentioned in the agreement was executed and delivered by the defendants.

The evidence on the part of the plaintiff tends to

show that a short time after the agreement was made, namely, in July and August, 1911, the defendants were not living up to and performing the above contract, and were selling draught beer manufactured by other parties, and that they continued to violate their contract during the latter part of July and the first part of August. On the 18th day of August, 1911, the note was placed in judgment and the chairs and tables loaned to the defendants by the plaintiff were removed from the saloon. The defendants admitted in their testimony that on two specific occasions, namely, about July 4th, and August 10th, they purchased several barrels of beer for use in their saloon business from the Garden City Brewery. The evidence for the plaintiff tended to show that they made other purchases of draught beer. The defendants undertook to justify their purchase of draught beer from the Garden City Brewery by testifying that on July 4, 1911, they telephoned the plaintiff for beer and were told by someone at the brewery that it was too late; that no one was at the brewery except the watchman and he could not deliver beer. On the other occasion they were told by someone in answer to a telephone communication that the delivery wagon was out and they would have to wait until its next trip before beer could be delivered.

In our opinion, the breach of the contract by the defendants was proved and admitted by the defendants, and that the excuses for the breach attempted to be made by the defendants did not show any justification of the action of the defendants in violating their contract, and does not support the judgment, and the judgment is unwarranted by the evidence.

The judgment must be reversed for erroneous rulings in admitting evidence. The court erred in admitting the telephone conversation between the defendant Portz and someone at the brewery, who answered the telephone call and claimed to be the bookkeeper for the brewery. It is not shown by

the evidence who the person was who answered the telephone, nor was it shown that he was known to Forts, the witness, or that his voice was recognized as being that of anybody known to the defendants, or authorized to speak for the plaintiff. (J. Obermann Brewing Co. v. Adams, 38 Ill. App. 540; Kimbark v. Illinois Car & Equipment Co., 103 Ill. 631).

The court also erred in admitting the testimony of Winstenburg, whose authority to speak for the plaintiff and bind the plaintiff by a conversation or conversations received in evidence between Winstenburg and the agents of the defendants was not proved. The burden of proof of authority of an agent is upon the party dealing with such agent and no proof whatever was offered by the defendants to show Winstenburg's authority. (Schoenhofen Brewing Co. v. Wengler, 57 Ill. App. 194; Blackmer v. Summit Coal and Mining Co., 187 Ill. 32).

We think the court erred in allowing the cross-examination of the witness Winstenburg upon a matter not covered or even suggested by his direct examination. This witness was called on behalf of plaintiff and his direct testimony was limited solely to the identification of the signatures of the defendants on the note in question. On cross-examination the defendants were permitted to ask him what his duties were and what he did for the plaintiff. This was not a proper cross-examination. The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

19926

521 - 19926.

JOHN CHRYSTAL,
Appellee,

vs.

JOHN S. LEVEL,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

190 I.A. 170

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

A judgment by confession was entered December 7, 1913, in the Circuit Court of Cook County, on a judgment note for $1,440 made by John S. Level and David H. Craig, payable to John Chrystal, dated May 18, 1913. The judgment was for $1,520.70, being for the face of the note with interest and attorneys' fees provided for in the note.

Afterwards the judgment was opened up and the defendants given leave to plead. They filed three pleas: (1) the general issue; (2) failure of consideration; and (3) want of consideration.

On the trial before the court with a jury, the plaintiff offered the note in evidence and rested. The defendants then attempted to make out their alleged defense to the note. At the close of all the evidence, the court directed the jury to return a verdict finding the issues for the plaintiff, and the verdict having been returned according to the direction, a judgment was entered on the verdict. Upon a careful review of the evidence, we do not think that it tended to prove either plea of the defendants and that the court, therefore, properly directed a verdict in favor of the plaintiff. The evidence does not show a want of consideration for the note. The plea avers that the note was made without any good or valuable consideration. The evidence offered by the defendants shows that the note in question was given in settlement of a lawsuit then pending between appellee, the plaintiff, and appellant, John S. Level, for

fraud and deceit, and also in consideration of a balance due on two promissory notes given by Lovel and Craig, defendants below, upon which certain payments had been made, leaving a balance due on the notes of $1,840, and that when the note in question was executed and delivered, the above mentioned notes for $4,000 and $1,750 respectively, were surrendered and marked "paid in full, May 28, 1912," and turned over to the defendant Craig, who, at that time, paid $900 on the notes. The evidence, therefore, shows a good consideration for the notes sued on.

There was no evidence offered by the defendants tending to prove a failure of consideration. The plea avers that the consideration of the note has wholly failed. This plea was not sustained by the evidence. If it be assumed that the certificate for fifty shares of stock, concerning which a large amount of evidence was offered by defendants, was invalid, the evidence, nevertheless, fails to show an entire want of consideration or an entire failure of consideration, as the uncontradicted evidence shows that the main consideration for the note sued on was the payment of the balance upon the prior notes above mentioned, and the cancellation and surrender of the notes and the dismissal of the suit pending against the defendants. The evidence shows that the certificate for fifty shares of stock of the Stockyards and Transit Company was valid and that it has always been retained by the defendants. The court did not err in directing the verdict. The judgment is affirmed.

AFFIRMED.

336 - 19941.

ELIZABETH MORRISON, Execx. etc., et al. George I. O'Brien. On Appeal of WM. SULLIVAN, appellant	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.
vs.	)	
AUSTIN STATE BANK, Appellee.	)	

190 I.A. 171

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

The proceedings, issues and facts in this litigation, up to the time of the filing of the bill of review herein, are set out fully in Austin State Bank v. Elizabeth Morrison, Executrix, et al., 133 Ill. App. 339, and need not be here repeated.

Upon the filing of the bill of review by the Austin State Bank in pursuance of the above decision of this court, issues were duly formed by the answers of the defendants and replications thereto. The cause was then referred to a master to take proofs and report his conclusions of law and fact. The testimony was taken before the master and appears in the record as a part of the master's report. The findings of the master's report fully cover the questions involved. They fully sustain the averments of the bill of review filed by the Austin State Bank. From the findings of the master it appears that the original complainants, John J. and James D. Morrison and William Sullivan, filed their original bill of complaint as set forth in the bill of review on March 19, 1901, and that upon that date process was issued upon the said original bill and was served upon George I. O'Brien, who duly entered his appearance and filed his answer, and that the complainants in the original cause filed their replication to said answer; that by an order entered March 19, 1901, Edwin J. Zimmer was appointed receiver of the firm of J. J. Morrison & Co. & O'Brien, and that he qualified as such receiver. The bank having filed an intervening petition, the receiver filed his cross-petition in said cause, and the bank filed its answer to

said cross-petition, and issues were joined upon said intervening petition of the bank and the cross-petition of the receiver. Testimony was taken and evidence offered in support of the petition, cross-petition and answer, and a decree was entered December 31, 1902, in the original case as set forth in the bill of review, and that said decree was taken by appeal to this court by said John J. Morrison, and the decree of the Superior Court was affirmed. An appeal was presented to the Supreme Court, and that court, on December 2, 1904, reversed the judgment of this court and the decree of the Superior Court, and remanded said cause to the latter court: that, after the filing of the mandate in said original cause, the cause was redocketed in the Superior Court and an order was entered by that court requiring the Austin State Bank to deliver to the receiver the warrants of the Town of Cicero purchased by it from Thomas O'Brien, and dismissing the intervening petition of the said Austin State Bank. Subsequent to the rendition of the decree in the Superior Court, in which the court found that the sole consideration for the endorsement and delivery of the warrants by said George I. O'Brien, a member of the firm of J. J. Morrison & Co. & O'Brien, to his father, Thomas O'Brien, was a previous indebtedness of said George I. O'Brien to his said father, and that said Thomas O'Brien was acquainted with the business and affairs of said co-partnership, and was chargeable with the knowledge that all said warrants were the property of said co-partnership, the intervening petitioner, the Austin State Bank, complainant, discovered that at the time the warrants in question, in said decree described, were endorsed and delivered to said Thomas O'Brien by George I. O'Brien, the warrants were so endorsed and delivered in partial payment of an indebtedness then due and owing from said co-partnership, J. J. Morrison & Co. & O'Brien, to Thomas O'Brien, and not for a debt past due to said Thomas O'Brien from his said son, George I. O'Brien, and that

said knowledge was first obtained by said bank after the affidavit of said Thomas O'Brien was filed in said original cause July 15, 1905, as set forth in the bill of review: that at the time of the making of said co-partnership agreement between said John J. and James D. Morrison, William Sullivan and George I. O'Brien, it was agreed that said J. J. Morrison & Co. should receive sixty per cent. of the net profits of their partnership ventures, and that said George I. O'Brien should receive forty per cent. of such profits, and it was further agreed at that date that Thomas O'Brien, father of said George I. O'Brien, should be employed by said firm of J. J. Morrison & Co. & O'Brien, as superintendent of the various contracts being executed by said firm, and should receive therefor twenty per cent. of the profits of said firm, which was to be charged against the share of the profits to be so received by George I. O'Brien; that Thomas O'Brien was so employed as superintendent during the summer and fall of 1901, and was not only entitled to a sum equal to twenty per cent. of said profits of the said partnership business, but that he also advanced sums of money to the partnership for materials and wages, the exact amount of which is not shown by the record; that George I. O'Brien, as a member of said co-partnership, was authorized and had authority to receive said certificates described in said decrees as having been received by him and was entitled to endorse the same and deliver them to said Thomas O'Brien in payment of the said partnership debt to said Thomas O'Brien; that said Thomas O'Brien received the warrants of the Town of Cicero as set forth in the petition and bill of review at the face value of $2208.50, to apply upon the amount due him from said firm, and such warrants thereupon became the property of said Thomas O'Brien, and that said bank, in purchasing the same for the sum of $2208.50 from said Thomas O'Brien, was acting in good faith and was fully entitled to receive the proceeds of said warrants.

The master found the facts as stated above and further found that said Zimmer, as receiver, received from said bank on said warrants said face value; and received, by order of court, from the defendant, George I. O'Brien, $534.21 derived from the American Bonding & Trust Company, and also received from George I. O'Brien the sum of $808.80. The master, in his report, finds that a rule was entered upon all the complainants in the original bill of complaint, to close their proofs in the cause. He finds that the proofs so offered on behalf of said complainants in the original bill failed to sustain the allegation of the original bill of complaint, and, therefore, recommended that the original bill of complaint be dismissed as without equity.

The master further recommended that a decree be entered herein, reviewing and revising said decree entered October 18, 1905, and directing that no further proceedings be taken thereunder.

Objections to the report of the master were filed in behalf of William Sullivan, the appellant, as follows: First - that the master in chancery has found as a matter of fact that Thomas O'Brien was employed as general superintendent by the firm of J. J. Morrison & Co. & O'Brien. The second and last objection is that the master has found that the warrants of the Town of Cicero, amounting to $2208.50, sold to the Austin State Bank, were at the time of said sale the property of said Thomas O'Brien, and that said bank was fully entitled to purchase and receive said warrants.

The findings of the decree entered in favor of the Austin State Bank fully cover the averments of the bill of review and the findings of the master's report, which it approves, and overrules the exceptions thereto, and, among other things, finds that the Austin State Bank is the sole owner of the warrants issued to the treasurer of the Town of Cicero, and that the amount of the warrants had been paid to the receiver, Zimmer, of the firm of J. J. Morrison & Co. &

O'Brien, in compliance with an order of court to that effect, and orders the receiver to give up all claims to any right, title or interest in the warrants, and that, after paying solicitors' fees for their services, finds that the bank is entitled to receive from the said Zimmer, as receiver, the sum of $2208.50, being the proceeds of the warrants of the Town of Cicero, less its proportionate share of the costs, including receiver's fees, disbursements and master's fees, which proportion the court finds to be the sum of $760.70, which, being deducted from $2208.50, leaves a balance of $1447.80, which sum the receiver is decreed to pay to the Austin State Bank. The decree further directs that the decree entered in the original case on October 16, 1905, reversing the original decree entered December 31, 1902, is reviewed and reversed, and that no further proceedings be taken thereunder, and that the decree, entered December 31, 1902, in the original cause, stand in full force and effect.

The decree entered on the same day, April 11, 1913, in favor of George I. O'Brien, finds that no objections or exceptions had been filed to such parts of the master's report as are in favor of George I. O'Brien, and that the report, in so far as it is favorable to said O'Brien, be approved: and further finds that a rule was entered upon the original complainants to close their proofs in this cause; that the proofs offered in their behalf failed to sustain the allegation of complainants' bill of complaint in the original cause, and that the bill of complaint in the original cause should be dismissed as without equity, and that George I. O'Brien is entitled to receive from the receiver, subject to the provisions herein, the sum of $808.80, and also the sum of $534.21, less his proportion of costs and fees allowed to the receiver and the receiver's solicitors, which proportion of costs the decree finds should be deducted from said amounts, and that the balance of said

items, amounting to $798.83, is the amount in the hands of the receiver and represents the interests of George I. O'Brien in the effects of said co-partnership firm of J. J. Morrison & Co. & O'Brien, in the hands of the receiver.

The decree also finds that on August 24, 1904, George I. O'Brien, in writing, for good consideration assigned to J. B. O'Connell, all of said O'Brien's right and title in the claim which he then had or might thereafter have in the effects of said co-partnership, and orders that said receiver turn over to and pay to said J. B. O'Connell, the sum of $798.83, and orders that O'Connell shall recover from the original complainants the sum of $544.38, as and for the costs and fees paid to the receiver and the receiver's fees and expenses allowed to him, which were deducted from said moneys paid to the receiver by George I. O'Brien, and that J. B. O'Connell have execution therefor.

It is first urged as a ground for reversal that the record contains no evidence showing that an account had been taken of the business and assets of the firm and hence the Superior Court had no proofs before it by which to determine what shares any one of the members would be entitled to receive out of those assets. This contention is without merit. The averments and prayer of the original bill, calling for a partnership accounting, were abandoned by the complainants in the original bill and no accounting was contended for, or was had, and no proof was offered by the original complainants bearing upon the question of an accounting. As the original cause was presented in the trial court, and on appeal in this court, and on a further appeal to the Supreme Court, the only question litigated was, whether the receiver or the bank was entitled to the warrants purchased by the bank from Thomas O'Brien to whom they had been transferred by George I. O'Brien, a member of the co-partnership, in payment of a past due debt, not from the co-partner-

ship but from George I. O'Brien. (Morrison v. Austin State Bank, 314 Ill. 472). The original complainants, including the appellant, William Sullivan, having abandoned in their original bill for an accounting and dissolution of the co-partnership, all right to an accounting and to a dissolution of the co-partnership, and having prosecuted their suit for the sole purpose of determining the above question, cannot now be heard to claim, as a basis for a reversal of the decrees entered on the bill of review, that there were no proofs before the court by which to determine what shares any one of the members of the firm was entitled to receive out of its assets, but must be confined to the issues which they have presented and litigated as above set forth. Having made no objections to the master's report or exceptions thereto, raising the question of want of proof on the accounting issue presented by the original bill, although ruled to make their proofs on their bill, the appellant cannot now for the first time raise in this court that question.

By the decrees entered in the Superior Court on the bill of review, which are now before us, it was sought to terminate the receivership by dismissal of the original bill under which the receiver was appointed. It was proper and equitable to decree that the proceeds of the warrants in the hands of the receiver be paid to the bank from whose possession the receiver originally took the warrants. It was likewise equitable and proper to decree to George I. O'Brien, or to his assignee, J. B. O'Connell, the money received by Zimmer, the receiver, from George I. O'Brien, less O'Brien's proportionate share of the costs and expenses of the receiver, for O'Brien paid the money to the receiver. No equitable right was shown in the complainants in the original bill to the money received from George I. O'Brien, or the proceeds of the warrants received from the bank, and it was equitable and just and in accordance with equity principle to dismiss a bill for partnership accounting for want of equity where no evidence is offered supporting

the bill, or where the evidence leaves the matter in such a state that it is impossible for the court to state an account. (Donaldson v. Donaldson, 237 Ill. 318). As stated in Coates v. Cunningham, 80 Ill. 437, "the receiver is the officer of the court, and his holding is the holding of the court for him from whom the possession was taken." It is proper on the termination of the receivership to put the parties in status quo, or as nearly so as possible. This requires a return of the property to the parties from whom the receiver took possession. No question was made before the master or before the Superior Court concerning the findings of the master that the moneys should be so returned. The appellant, having filed no exceptions to the master's report recommending the return of the proceeds and moneys, after deducting the costs and expenses, is bound thereby. (Jones v. Crary, 234 Ill. 26).

In regard to the decree ordering the money paid to the Austin State Bank, no partnership accounting was necessary in any event. It was not incumbent upon the Austin State Bank to enter upon such proofs for the reason that its right to the proceeds of the warrants was not affected by such accounting. That decree was not entered upon the theory of awarding the funds in the receiver's hands to the State Bank as a part of the share of George I. O'Brien in the assets of the firm. According to the finding of the master from the evidence and the findings of the decree, George I. O'Brien, as a member of the firm, had the right and power to pay to Thomas O'Brien for services rendered to the co-partnership and for money advanced on behalf of the co-partnership, the warrants of the Town of Cicero, and thereby give said Thomas O'Brien a good title to said warrants, the consideration therefor being the indebtedness of said firm to said Thomas O'Brien.

As to the decree in favor of George I. O'Brien and his assignee, the right of said O'Brien as a partner to the moneys which he paid over to the receiver was not questioned by appellant or the

complainants in the original bill and no proofs were offered showing that the money did not belong to him. When the complainants to the original bill abandoned their claim to an accounting from George I. O'Brien and abandoned also their adverse claim, if any, to the moneys paid by him to the receiver by refusing to offer proofs pursuant to the ruling of the master to do so, George I. O'Brien's title, or the title of his assignee, to such moneys was not controverted, and the decree was entered upon the theory of awarding the funds in the receiver's hands to the parties who paid it to the receiver and not to him as his share of the assets of the firm.

The decrees are affirmed.

AFFIRMED.

565 - 19970.

WILLIAM E. MASON, EXECUTOR, etc., Appellee, vs. SUSAN KOBLISKA et al. On Appeal of JAMES W. HOOPER and ONA A. HOOPER, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

190 I.A. 178

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree on a bill of foreclosure entered in the Superior Court upon a Master's report finding the facts alleged in the bill and recommending a decree. The bill alleges, as a ground for declaring the whole indebtedness due, that the taxes legally levied for 1907 were not paid and the premises were sold for said taxes, and that there had been no redemption from the sale.

Objections and exceptions were filed to the Master's report which were overruled by the court and the report of the Master was approved and confirmed. The decree is in the usual form of a foreclosure decree.

It is urged on behalf of appellants that no evidence is contained in the record showing a tax sale or deed upon the property covered by the mortgage. The record originally filed by appellants was a praecipe record which omitted all of the exhibits attached to the Master's report, which were duly filed in court with the report. The abstract shows that there was offered in evidence a certified copy of the tax deed to the premises in question. The record fails to show that appellants served upon appellee or his attorney any notice of the time and place as to when and where he would file his praecipe for the record in the cause, together with the copy of the praecipe as provided by statute. Appellee had no opportunity, therefore, to make the record more

complete, or have it include the omitted evidence, or file an additional praecipe requesting the clerk to certify such additional parts of the record as might be necessary and desirable for a review of the decree. Upon this state of the record appellants argue that no evidence is contained therein showing any tax sale or deed upon the property. Subsequent to the filing of the briefs, appellee has filed a transcript of additional parts of the record, including the exhibits attached to the Master's report. These exhibits show a sale for taxes on the premises in question, and a tax deed thereof as averred in the bill of complaint and shown by the Master's report. We have little patience with this manner of presenting the record for review and then arguing on the cause upon the basis of the want of such evidence.

The further contention is made that not one scintilla of evidence appears in the record showing that complainant had elected to and did declare the whole indebtedness due. The counsel for appellants, we assume, would hardly admit that they are not familiar with the case of Curran v. Shouten, 201 Ill. 442, which holds that the exercise of such option is indicated by the filing of a bill to foreclose; that the determination on the part of the holder of the notes to file a bill for the foreclosure of the trust deed for the entire indebtedness and causing the same to be prepared and filed in pursuance of such determination is a sufficient election to declare the whole sum due and to entitle him to maintain his bill.

We have examined the record, including the evidence contained therein, and we are of the opinion that it abundantly sustains the decree, and we find no ground for the reversal of the decree. The decree is affirmed with ten per cent. damages for prosecuting the appeal for delay, as provided by Section 23,

Chapter 33, R. S., and the costs of the additional record filed in this court on June 2, 1914, are to be taxed against appellants.

DECREE AFFIRMED.

574 - 19979.

ELMER W. JARNECKE, Appellee,	)	
	)	APPEAL FROM
vs.	)	CIRCUIT COURT
CHICAGO CONSOLIDATED TRACTION COMPANY, Appellant.	)	COOK COUNTY.

190 I.A. 179

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

There have been four trials of this case, including the trial on review. There have been two appeals to this court prior to this present appeal. (Jarnecke v. Chicago Consolidated Traction Co., 150 Ill. App. 548; Lame v. Lame, 175 id. 424). In the opinion filed in the second appeal is a general statement of the pleadings and evidence which is sufficient for our present purpose.

It is argued, first, that the evidence does not fix liability for appellee's injury upon appellant. Upon a review of the evidence bearing upon that question, we are unable to agree with the contention of appellant. It is contended that the holding of this court on the first appeal, that the evidence failed to sustain the negligence charged, is binding upon this court. The evidence in the record before us is quite different in material respects from that in the record on the first appeal. If it be conceded, (which we do not concede), that upon the same state of facts a previous holding of this court upon a question of fact would be binding upon the court on this appeal, it clearly appears, we think, that the evidence in at least one important particular differs materially from the evidence on the first trial, and we are of the opinion that we must decide the case upon the evidence in the record now before us.

It appears, we think, that in some respects new evidence was offered bearing upon the question of negligence so that this court, in its opinion upon the first appeal, was dealing with a different situation from that which the present record discloses. One of the material links in the evidence shown in the present record

was missing on the first trial. The testimony, which traces the car on which the accident happened from the time it left the barn in the morning of the day up to and until the time of the accident to appellee, fairly tends to show that the wire which fell and injured the plaintiff was not used or examined or handled by any conductor or motorman during the day prior to the time of the accident. There was no occasion for the use of the wire and nothing was done with it by either Barnett or Smith, who preceded the plaintiff as conductors on the car in question during the day. Neither Barnett nor Smith testified on the first trial of the case, and no evidence was introduced as to what had occurred to the car apart from the trips it took, between the time it left the barn in the morning and the time it was turned over to the plaintiff as conductor. The evidence tends to show that the car was not in actual use from August 10th to August 18th and that during that interim it was stored in the barn. Appellant claims that the car was inspected while in the barn sometime after its return to the barn on August 10th. The manner of inspecting the car shown in the record, and the evidence as to the position of the car in question in the line of cars inspected by the inspector for appellant afforded a basis for the jury to conclude that the wire in question, which fell from the roof and came in contact with plaintiff's hand, was not inspected in the barn, and that the defect in the wire, namely, the absence of a plug and the absence of insulation shown by the evidence, existed when the last inspection took place, and was not discovered at that time. If the car in question was the last car in the line inspected, as there is evidence tending to show, the turning on of electricity when the inspection was made in the manner described by the evidence would not reveal the absence of the plug or the absence of insulation on the wire; for, if that end of the car was not coupled up with any other car, the wire, as it hung in the canopy of the car, would not be handled or used in the inspection; and the absence of the

rubber plug and the insulation could only be discovered by taking down the wire and examining it. There is no evidence that this was done.

The duty to inspect was, of course, upon the defendant, appellant, and could not be delegated. It was the duty of appellant to furnish the plaintiff a safe place in which to work. Non-compliance with this duty is not one of the ordinary risks assumed by the servant. (Sonato v. Peabody Coal Co., 248 Ill. 422-25; Armour v. Wolkowska, 202 id. 144). This duty of the master to furnish a safe place to work is a continuing duty, and if, while the servant is working, the place is made unsafe by reason of the master's negligence without the servant's knowledge, the master is liable for the injury. (Commonwealth Electric Co. v. Rooney, 158 Ill. App. 278). The servant may assume that the master has provided a reasonably safe place for him to work, unless he is chargeable with notice that it has not been done, or if such unsafe condition was so apparent as to have been obvious to a person of ordinary intelligence, in which event he would have assumed the risk of injury from such defect by voluntarily continuing in the service. (Sonato v. Peabody Coal Co., supra; Schillinger Bros. Co. v. Smith, 235 Ill. 74). The evidence does not show that the condition of the wire was so apparent as to have been obvious to a person of ordinary intelligence or even to one of special training and intelligence in such matters, for neither of the conductors who had charge of the car in question on that day prior to the time the car came under plaintiff's charge, noticed that the rubber plug or the insulation was absent from the wire, although it hung in the canopy of the car just above their heads while they were serving on the car. These questions were for the jury to decide on the evidence and under the instructions of the court, and we think there is no justifiable reason for us to interfere with the verdict, for there was sufficient evidence before them to warrant the inferences of negligence on the part of defendant, which were drawn by the jury.

The question for the jury to determine was whether the wire on the trailer car was out of order or not when the plaintiff took charge of the car as conductor. If it was out of order, the defendant was negligent. We cannot say that the evidence fails to show that the wire was out of order. On the contrary, we think the evidence tends to show that the wire was then out of order.

It is contended on behalf of appellant that counsel for plaintiff during the trial made improper remarks and prejudicial pretenses to the effect that there was material evidence in the case which the defendant had in its power to produce and refused to produce: and that the plaintiff was otherwise being oppressed and obstructed unnecessarily in the presentation of his case.

Counsel for plaintiff served notice on defendant to produce certain documentary evidence, including the trip sheets of plaintiff, Anderson, Barnett and Smith, and other documentary evidence which had been used on former trials of the case. Plaintiff's counsel was notified by defendant's attorney that these documents could not be produced; but, notwithstanding such notice and notwithstanding the testimony of witnesses to the effect that the documentary evidence called for had been lost, counsel proceeded to carry on a protracted investigation by calling several witnesses connected with the defendant in various capacities, and by questions and remarks made in the presence of the jury insinuated that the defendant had the evidence in question and was able to produce it, and that it was being improperly withheld for some wrongful purpose by the defendant. Upon an examination of that part of the record showing the examinations on this point and the remarks of counsel for the plaintiff in arguing in favor of his right to make the examinations which he was endeavoring to make, we think that counsel for the plaintiff exhibited extraordinary persistence which was unnecessary and was condemned by the court while the examination was proceeding. The court sustained objections made by counsel for de-

fendant, not only to the questions propounded to the several witnesses, but to the remarks made by counsel for plaintiff during the examination. Reviewing the whole proceeding, we are inclined to the opinion that the extended examination, in an effort to produce the documents which were shown to be lost, after it appeared that copies of the documents which were offered on a former trial of the case appeared in the record of such trials, and could be produced and were produced without objection on the part of defendant, was unreasonable. But the effect, as it appears to us, of the extended examination of witnesses and of the remarks made by counsel for plaintiff, and the rulings of the court tended rather to the injury of the plaintiff than to the defendant. Counsel's course of action would naturally prejudice the cause of the plaintiff. The rulings of the court were fair and correct, and indicated no bias against the plaintiff, and the persistence of the counsel for plaintiff, in his examination, after it appeared that the original documents could not be produced, would naturally, in our opinion, tend to prejudice the jury against the plaintiff, if it had any effect upon them. We do not think that defendant's cause was in any wise prejudiced thereby or that it constituted reversible error.

Complaint is made of the second instruction requested by plaintiff, which was as follows:

> "You are instructed that where two witnesses testify directly opposite to each other on a material point, you are not, as a matter of law, bound to consider the evidence evenly balanced so far as those two witnesses are concerned, but that you may regard all the surrounding facts and circumstances, and all other evidence, if any, and give credence to one witness over the other if you believe, from all the facts and circumstances as proven, that that witness' testimony is entitled to more credit than the other."

It is contended that this instruction was misleading and prejudicial to defendant, and that it was the duty of the jury to reconcile the testimony where it could be reconciled; that this instruction on principle was wrong, because, if it were true that one witness did testify directly opposite to another on a material point,

the fact that there was one against one was an important element and it was the duty of the jury to consider that element of numbers which the instruction ignored; and it is further contended that the instruction authorized the jury to regard all the surrounding facts and circumstances and all other evidence, whereby it assumed the surrounding facts were evidence, without regard as to what such facts and circumstances were. If they were the circumstances appearing on the trial, that element was improper, for it might include the fact that plaintiff's wife sat by him throughout the trial and the improper statement of fact made by plaintiff's attorney during the argument, that "Jarnecke is a loyal client, a loyal husband, a loyal father and a loyal friend," was one of the surrounding facts and circumstances before the jury. The People v. Terrell, 282 Ill. 138, and other cases are cited in support of the objection.

It is further claimed that the instruction invaded the province of the jury to determine the credibility of the witness.

We do not think the jury would understand the instruction as contended for in counsel's criticisms. A similar instruction was before the court in C. & E. I. R. R. Co. v. Rains, 203 Ill. 417, 422, and was there held not to contain reversible error.

Objection is also made to the fourth instruction, tendered by plaintiff and given by the court, which read as follows:

"The court instructs you that as a matter of law a servant is not bound to inspect the appliances furnished him by his master, but he has a right to assume that the master has used ordinary care and diligence to furnish him with appliances reasonably safe for the performance of his duty: the servant is bound to take notice of such defects only as actually come to his knowledge, or as would be disclosed by ordinary care in the use to which the servant puts them in the discharge of his duties, and in observing the appliances furnished him; and if you find from the evidence that the electric light connecting wire in question was defective, as charged in the declaration, and was the cause of the accident and injury to the plaintiff, and that the plaintiff did not know of such defect, and by the use of ordinary care in observing the car furnished him, and in the use thereof by him, in the discharge of his duties to the defendant, plaintiff would not have discovered said defect; and if you find further from the evidence that the defect, if any, in said electric light connecting wire, was one which would have been discovered by the defendant by the exercise of ordinary care in inspecting the same,

or said car, in time to prevent the accident, you should find the defendant guilty, provided that you find that the plaintiff, at the time of his injury, was in the exercise of ordinary care and that he was also exercising ordinary care with respect to the operation of said car during the time he had charge of the same."

It is argued that the instruction was misleading and inapplicable to the case. In our opinion the instruction is not misleading or inapplicable to the case. We think it states the law substantially as held in Penn. Coal Co. v. Kelly, 154 Ill. 9, 16, 17, and the cases there cited.

Instruction numbered 8, requested by plaintiff, is as follows:

"You are instructed that as a matter of law the plaintiff is not chargeable with knowledge of all defects which an inspection of the car in question would have disclosed, but he is chargeable with those defects, and those defects only, which actually came to his notice or attention, or which in the usual, ordinary and careful discharge of his duties as conductor should have with ordinary and careful observation, come to his knowledge or attention, or should have come to the knowledge or attention of an ordinarily careful and prudent person acting as conductor under like circumstances."

This instruction is claimed to be fundamentally unsound because it assumes throughout that there was a defect; and it tells the jury that the plaintiff was chargeable with those defects and those defects only which actually came to his notice or attention, or which, in the usual, ordinary and careful discharge of his duties as conductor should have, with ordinary and careful observation, come to his knowledge or attention; and because it ignores defendant's contention that plaintiff was inattentive to his duties, and that if a defect existed prior to the accident, it was an open and obvious one that would have been discovered by any prudent conductor in the performance of his duties.

There was no controversy in the evidence that the defect existed at the time of the injury, and hence it could be assumed in the instruction as a fact. In our opinion the objections to the instruction are not well taken.

Plaintiff's counsel, in his closing argument to the jury, said: "Now you have seen enough in this case, and you know enough about men, you know enough about what has transpired during the past ten years to know that Jarnecke is a loyal client; you have reason to believe that he is a loyal husband, a loyal father and a loyal friend."

This statement was objected to by counsel for defendant as having no business in the case and was entirely improper. The objection was sustained.

The remark was improper. There was no justification for making it. In making it, counsel appealed to matters not in evidence, and in themselves wholly irrelevant to the case, and manifestly improper to refer to in argument. If we could see that the remark had any effect upon the jury, we would be compelled to reverse the judgment under the holdings in Jones & Adams Co. v. George, 227 Ill. 64; McCarthy v. Spring Valley Coal Co., 232 id. 473; and other decisions in this jurisdiction. But we cannot say that there is any basis to be found in the amount of the verdict for the conclusion that the jury allowed the improper remarks of counsel to sway or influence them to any extent. We cannot regard a verdict of $5,000, upon the evidence in the record, as at all excessive, or that it was reached as a result of passion or prejudice, or, that it was the result of consideration by the jury of the matters above referred to, wrongfully brought to their attention by plaintiff's counsel. It was harmless error, we think.

We find no error in sending to the jury the exhibits offered in evidence.

The judgment is affirmed.

AFFIRMED.

90 - 20005.

OTTO BERGMAN, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
THE EMPIRE TEA COMPANY, (a Corporation), Plaintiff in Error.	)	OF CHICAGO.

190 I.A. 181

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This writ of error brings before us for review a judgment in the Municipal Court entered on October 15, 1913, in favor of Otto Bergman, defendant in error, against the Empire Tea Company, plaintiff in error.

On July 27, 1912, a horse belonging to plaintiff in error, the Empire Tea Company, ran away while the driver was preparing to feed it at 47th street and Union avenue, in Chicago. The horse and wagon collided with a buggy owned by the plaintiff, Otto Bergman, defendant in error, and tipped the buggy over and threw the horse on the street. Bergman, in his statement of claim, averred that all four wheels of his buggy were injured and his horse afterwards died in consequence of the collision.

The cause was tried before the court without a jury. No propositions were submitted to the court to be held as law in the case; only questions of fact are, therefore, involved in the absence of any contention on the part of plaintiff in error that the court erred in its rulings on evidence.

Upon a review of the evidence, we are of the opinion that it tends to support the cause of action set forth in the amended statement of claim. The evidence is sufficient to warrant the court in finding that the driver of the horse and wagon of plaintiff in error was guilty of negligence in placing his horse in a dangerous place, - under an elevated railroad track where trains were passing frequently and taking the bridle bit out of the mouth of the horse

and leaving it unhitched and practically unfettered and in an unmanageable condition while he was engaged on some errand at the wagon.

As to the contention that the evidence does not show that the collision between the plaintiff in error's horse and wagon and the defendant in error's rig did not produce the injury to the horse, from which it died shortly after the accident, we are of the opinion that the evidence sufficiently shows that the collision was the cause of the loss of the horse. The evidence affords a basis for that conclusion, and we see no reason in the record for setting aside the finding and judgment of the court below.

The judgment is affirmed.

AFFIRMED.

148 - 20070.

ABRAHAM MADRENSKY, Defendant in Error,	)	ERROR TO
vs.	)	MUNICIPAL COURT
SOLOMON RITMAN and L. FELDMAN, Plaintiffs in Error.	)	OF CHICAGO.

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

A judgment was recovered in the Municipal Court of Chicago against plaintiffs in error, a partnership, for $45 claimed to be a balance due on account of wages. The "correct statement of facts appearing on the trial" does not, on examination, show that it is a statement of facts. It contains evidence of sundry witnesses and also what is stated to be facts which are not in dispute. It is not a statement of facts under the law. The record shows that a book of entries was exhibited to the court and examined by the court. The entries so examined and considered by the court are not contained in the statement of facts. We cannot ascertain from the record before us that we have all the evidence which was introduced before the trial court. This court will not reverse a judgment of a trial court unless it is satisfied that it is contrary to the law and the evidence, or that such judgment resulted from substantial errors in the trial court directly affecting matters in issue between the parties. (Hamilton v. Tuttle, 157 Ill. App. 345; Judd Mfg. Co. v. Paris D. & S. Co., 182 id. 600.)

The judgment is affirmed.

AFFIRMED.

148 - 20070.

ABRAHAM MADENBERG, Defendant in Error	)	
	)	ERROR TO
VS.	)	
	)	MUNICIPAL COURT
SOLOMON RITMAN and L. FELDMAN Plaintiffs in Error	)	OF CHICAGO

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT

190 I.A. 185

A judgment was recovered in the Municipal Court of Chicago against plaintiffs in error, a partnership, for $45 claimed to be a balance due on account of wages. The "correct statement of facts appearing on the trial" does not, on examination, show that it is a statement of facts. It contains evidence of sundry witnesses and also what is stated to be facts which are not in dispute. It is not a statement of facts under the law. The record shows that a book of entries was exhibited to the court and examined by the court. The entries so examined and considered by the court are not contained in the statement of facts. We cannot ascertain from the record before us that we have all the evidence which was introduced before the trial court. This court will not reverse a judgment of a trial court unless it is satisfied that it is contrary to the law and the evidence, or that such judgment resulted from substantial errors in the trial court directly affecting matters in issue between the parties. (Hamilton v. Tuttle, 157 Ill. App. 345; Judd Mfg. Co. v. Paris D. & C. Co., 182 id. 800.)

The judgment is affirmed.

AFFIRMED.

188 - 20112.

CHAS. H. BROWN PAINT CO.,
a Corporation,
Defendant in Error,

vs.

C. A. ERICKSON & BROS.,
a Corporation,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

190 I.A. 186

This writ of error brings to this court for review a judgment of the Municipal Court of Chicago rendered against plaintiff in error in favor of defendant in error. The action was for merchandise sold and delivered by defendant in error to plaintiff in error. The affidavit of defendant in error's claim showed that there was due to it from plaintiff in error $50.45 for merchandise sold and delivered.

The affidavit of merits filed by plaintiff in error stated that it had paid all of defendant in error's claim except a balance of $7.95; that a large portion of the material delivered by defendant in error was defective and unfit for use by them of which plaintiff in error had sustained damages.

The plaintiff in error's evidence of payments was properly ruled out by the trial court. It tended to show payments to an alleged agent of defendant in error, but did not show any authority of the agent to receive payments.

No actual damages were shown by reason of defective and unfit material delivered, and, therefore, no defense to the claim sued on was made out. The trial court properly found the issues for the defendant in error.

The judgment is affirmed.

AFFIRMED.

215 - 20140.

H. D. KELLOGG, Defendant in Error,	)	
	)	ERROR TO
vs.	)	MUNICIPAL COURT
INTERSTATE INDEPENDENT TELEPHONE & TELEGRAPH CO. (a Corporation), Plaintiff in Error.	)	OF CHICAGO.

190 I.A. 187

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

By this writ of error it is sought to reverse a judgment entered by the Municipal Court of Chicago in favor of H. D. Kellogg, defendant in error, against the Interstate Independent Telephone & Telegraph Company, plaintiff in error, on four coupons issued by plaintiff in error in accordance with the provisions of a deed of trust or mortgage given to secure the same, and subject to the conditions thereof.

The statement of claim and affidavit for the plaintiff below was filed upon two coupons. The defendant below filed an affidavit of merits setting up the provisions of the mortgage which provided that the trustee might execute the power of entry and sale of the mortgaged property in case of default and prohibited the holders of bonds from taking proceedings at law or in equity to foreclose or procure a sale of the property independently of the trustee.

The plaintiff Kellogg moved to strike the affidavit of merits from the files. Pending a decision of the motion, by stipulation of the parties, the plaintiff was allowed to file an amended statement of claim instanter and the affidavit of merits of the defendant was ordered to stand to the plaintiff's statement of claim as amended. The plaintiff filed, on the same day, an amended statement of claim covering two additional coupons.

The record shows that immediately following the above order, the plaintiff made a motion to strike the affidavit of merits from the files, and the motion was granted. Thereupon the defendant elected to stand by its affidavit of merits. The court then entered an

order of default of the defendant and heard evidence on the question of damages, and assessed the plaintiff's damages at $100, and entered judgment thereon.

Some question is made in argument as to the regularity of the proceedings, but we think there is no reversible error therein.

As to the defense set up in the affidavit of merits, and the order striking the affidavit from the files because it did not set up a good defense on the merits, we think the decision and ruling of the court was correct upon the grounds set forth in Lyon v. The New York, Susquehanna & Western R. R. Co., 14 Daly 489. The costs of the additional abstract will be taxed to plaintiff in error. The judgment is affirmed.

AFFIRMED.

(Interlocutory.)
21063
21,063.

MICHAEL P. GAUER, vs. EDWARD G. VOLTZ, et al.	APPEAL FROM
JOSEPH P. JENE', Appellant, vs. GEORGE VICTOR HAERING, Appellee.	SUPERIOR COURT COOK COUNTY.

190 I.A. 189

MR. JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

This appeal is from an order appointing a receiver pursuant to a petition filed by George Victor Haering, appellee, a second mortgagee, after the foreclosure and sale of the premises under the first mortgagee's bill.

The original bill in this case was filed by Michael P. Gauer to foreclose a trust deed which was a first lien on certain premises in the city of Chicago. Appellee, Haering, was a defendant to the original bill. The appellant, Joseph P. Jene', purchased the equity of redemption after the bill was filed and became a party to the suit later. The other parties to the original bill were the unknown owners of the third mortgage note and various persons who at one time or another had owned the equity of redemption, or who had an interest therein at the time the bill was filed.

The case was referred to a master upon the original bill and answers thereto. The master duly made his report and a decree was entered in accordance therewith, directing that the premises be sold to pay the first mortgage note. The property was then sold to the first mortgagee for the amount of his claim. There was neither deficiency nor excess.

After the sale and the report thereof, the second mortgagee, Haering, appellee, filed what he labeled as a "cross-bill." This document set forth that he was one of the defendants in the

original bill; that the decree had found the Sauer mortgage a first lien and his own a second lien; that the decree had found the amount due upon his own note $1,724.04, and that the premises had been duly sold for the amount due on the first mortgage. He further alleges that the trust deed securing the second mortgage note provides that upon the request of the holder of the indebtedness, the trustee should have the right to take possession of the premises and collect the rents, issues and profits thereof and apply the same toward the payment of his note, and that upon foreclosure the court might appoint a receiver to collect the rents, issues and profits during the pendency of the proceedings and until the period of redemption should have expired. He further alleges in his petition that the property is not worth more than the amount paid for it by the first mortgagee at the sale, and that the only fund out of which the second mortgage could be paid is the rents and profits arising during the redemption period, and that the maker of the note is insolvent. The petitioner then prays that a receiver be appointed and that the rents, issues and profits be applied toward the payment of the second mortgage. No other specific relief is prayed, and no parties are named as defendants to the petition.

Appellant, Jene', then filed a petition setting up that since the filing of the original bill he had become the owner of the equity of redemption and was, therefore, entitled to the rents, issues and profits of the property during the redemption period, unless one of the mortgagees had the right to collect the same through a receiver. The court permitted appellant to intervene and plead. He thereupon filed a demurrer to the so-called cross-bill.

The court, nevertheless, appointed a receiver pursuant to the petition, or so-called cross-bill. The receiver duly qualified by filing a bond and is in possession.

Although the paper filed by appellee is labeled a "cross-bill," it is a mere petition. It does not ask that any one shall answer it and it asks for no relief except a receivership. No one is made a party to the bill and no accounting, no decree of foreclosure or sale is asked for. It is a mere motion paper. (McMillis v. Hogan, 68 Ill. App. 194; Purdy v. Menzies, 97 Ill. 3[illegible]; 16 Cyc. 330; Ruprecht v. Henrici, 113 Ill. App. 3[illegible].)

A receiver will not be appointed upon a mere petition. A receivership must be ancillary to some other relief and, unless there is some pleading upon which the petitioner will probably be entitled to a specific equitable relief, a receiver should not be appointed. A petition is not such a pleading. (Ruprecht v. Henrici, supra; Same v. Same, 118 id. 583; Ruprecht v. Muhlke, 225 Ill. 186; Powell v. Starr, 100 Ill. App. 106).

The record contains no pleading on which the order appointing the receiver could be legally made. The order is reversed.

REVERSED.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

R-H Denied Oct 7/14

BE IT REMEMBERED, that afterwards, to-wit: on the 15th day of April, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5834.

Frank J. Burns, et al appellees.

vs Appeal from Kankakee.

Illinois Central Railroad Co.

appellant.

Whitney, P. J.

On February 6, 1912, appellees filed their petition to have made and enforced an attorney's lien under the statute Joe Lococo, an Italian boy, over sixteen years of age, who had been a resident of the United States for twenty three days and had been a few days in the employ of appellant, was injured at Kankakee while in such employ, and was taken to the hospital and had two amputations by the company's surgeon and lost a foot. He had an uncle, Joe Dicarlo living in Kankakee who employed appellees to make a claim against the railroad company for damages and to prosecute a suit to recover such damages. They performed certain services. They mailed a notice to the company on July 3, 1911, that they would claim a reasonable attorneys fee for having been employed to get the matter adjusted, having no agreement as to the amount of compensation. Thereafter, appellees and said uncle had a disagreement, which caused appellees to cease to act in the matter and it was placed in the hands of a fewale Italian interpreter. Thereafter and on August 2, 1911 appellees notified the railroad company by letter that the matter was out of their hands and that they should expect a reasonable compensation to be paid them by the rail road company in case of a settlement. Thereafter the company settled with Lococo and his uncle procured another lawyer to start a suit. A declaration was filed and a jury was impaneled and testimony given and the jury returned a verdict for an agreed sum of $6000.00 which was p aid. Burns &

Dec. 20, 1924.

Frank T. Burns, et al appellees.

vs Appeal from Kankakee.

Illinois Central Railroad Co.

appellant.

Mitchey, P. J.

On February 6, 1923, appellees filed their petition to have made and enforced an attorney's lien under the statute for Rocco, an Italian boy, over eighteen years of age, who had been a resident of the United States for twenty years but had been a few days in the employ of appellant, was injured at Kankakee while in such employ, and was taken to the hospital and had two amputations by the company's surgeon and lost a foot. He had an uncle, Joe Rocco living in Kankakee who employed appellees to make a claim against the railroad company for damages and to prosecute a suit to recover such damages. They performed certain services. They mailed a notice to the company on July 3, 1923, that they would claim a reasonable attorney fee for having been employed to get the matter adjusted, having no agreement as to the amount of compensation. Thereafter, appellees and said uncle had a disagreement, which caused appellees to cease to act in the matter and it was placed in the hands of a female Italian interpreter. Thereafter, and on August 3, 1923, appellees notified the railroad company by letter that the matter was out of their hands and that they should expect a reasonable compensation to be paid them by the railroad company in case of a settlement. Thereafter the company settled with Rocco and his uncle procured another lawyer to start a suit. A deposition was filed and a jury was impaneled and testimony given and the jury returned a verdict for an agreed sum of $8000.00 which was paid. Burns &

Burns then filed the petition above mentioned for an attorney's lien. The railroad company answered the petition. There was a hearing and decree for $300.00. Afterward for some reason not disclosed by the record, but apparently for some lack of fullness in the judgment or decree, it was at the same term of court vacated and another judgment or decree was entered for appellees for $300.00 and this is an appeal by the railroad company from that last decree. The appeal was to the supreme court on the ground a constitutional question was involved. That court held that the constitutional question had been settled in the Stan didge case 254 Ill. 524, and ordered the case transferred to this court. (Burns v I. C. R. R. Co. 258 Ill. 302.)

It is contended there is not sufficient proof that appellees were partners. We think when the entire record is considered there is sufficient of such proof, and besides the decree is in ~~favor~~ their favor in their individual names. It is also contended that there is no proof that at least one of the petitioners is an attorney. That issue was not raised by answer to the petition. The most material question raised by the record is that appellees were not sufficiently employed.

We held in Haj v American Bottle Co. by opinion filed August 2, 1913, that attorney's services are necessaries for which the minor could bind himself, and so could his next friend, and agree to pay a reasonable compensation.

The uncle of Lococo, at whose house apparently he lived, engaged appellees to take the claim of Lococo in the first place, and afterward one of appellees had several conversations at the house with Lococo and his uncle. What appellees did was what ultimately brought about the settlement between Lococo and appellant.

We are of the opinion that there is sufficient evidence to show the employment, and that appellees have a just claim against Lococo for their reasonable attorneys' fees.

It is contended that no sufficient notice was given. The only notice was contained in two letters mailed to the officers of the corporation and obviously received by them, the first dated July 3, 1911, while appellees were still acting for Lococo, and its receipt is shown by letter from the claim agent of the company to appellees under date of July 11,1911, answering the letter of July 3, 1911. A further statement of the claim was also given in the letter of appellees to said claim agent on August 4, 1911, after they had ceased to be the attorneys for Lococo. We held in the last case, above mentioned, that such notice could be by letter but we were reversed in that case by the Supreme Court in 121 Ill. 520, where it was held that personal service of notice was necessary in order to maintain a lien under the statute. There having been no personal service of notice on appellant, the judgment must be reversed, and as it is now too late to serve such notice to preserve the lien the cause is not remanded.

Judgment reversed.

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STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this fifteenth day of April, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

R. H. Daniel Oct 5/14

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5851.

Patrick J. Ryan, et al appellees.

vs Appeal from Lake.

Michael C. Hayes ~~et al~~ appellant.

Carnes P. J.

Appellees Patrick J. Ryan, and Catherine Burns as administratrix of the estate of J. Frank Tyrrell, deceased filed a bill May 11, 1908 to foreclose a trust deed on about 200 acres of sand and gravel land in Lake county, h which on its face secured a note of $6000. and two notes of $13500 each, payable to the order of the maker Michael C. Hayes, appellant; alleging that the $6000 note is the property of said appellants and the other two notes the property of appellees Kenneth R. Smoot and Clarendon D. Eyer respectively. Appellant answered admitting the execution of the notes and trust deed, but denying any present indebtedness thereon and averring that there was no consideration for any of said notes except $3000 received by him on the $6000 note. He filed a cross bill alleging usury and fraud; other parties in interest were duly brought before the court, issues presented by the pleadings and the cause submitted to the master in chancery, who was over a yearh in hearing testimony and determining the questions of law and fact, when he made his report thereon in detail, recommending a decree dismissing the cross bill for want of equity and granting the relief prayed in the original bill; finding $6389.97 due appellees Ryan and Burns, and $1500 for their solicitor's fees, and $15363.42 due each of the appellees Smoot and Eyer. Objections and exceptions were filed and heard, and the chancellor after modifying certain of the findings of the master entered a decree, as

Sup. No. 5881.

Patrick J. Ryan, et al appellees,

vs Appeal from Lake.

Michael C. Hayes et al appellant.

Barnes P. J.

Appellees Patrick J. Ryan, and Christine Ryan as administrator of the estate of J. Frank Ryan, instituted this a bill May 11, 1908 to foreclose a mortgage on about 200 acres of sand and gravel land in Lake County, which on its face secured a note of $8000, and two notes of $1500 each, payable to the order of the Michael C. Hayes, appellant; alleging that the $8000 note is the property of said appellants and the other two notes are the property of appellee Patrick J. Ryan and Christine J. Ryan respectively. Appellant answered admitting the execution of the notes and mortgage, but denying any present indebtedness thereon and asserting that there was no consideration for any of said notes and the $8000 mortgaged by him on the $8000 note. He filed a cross bill alleging fraud; other matter in intercept that may remain before the court, issues presented by the pleadings for the court submitted to the master in chancery, who has made a report in master testimony and determining the ultimate facts and fact, that he made a recommendation (in part) recommending a decree dismissing the cross bill as to appellant Ryan; finding $1500.00 due appellee Ryan on the note, and for this weighing" lien, in favor, and for appellees Smoot and Ryan. Objections and exceptions were filed and heard, and the chancellor after modifying certain of the findings of the master entered a decree, as

finally amended, substantially as recommended, except the solicitors' fees were fixed at $750 instead of $1500. Appellant's abstract of the record contains 404 pages and appellees have filed an additional abstract. Extensive briefs are filed in an effort to present the various questions here submitted on a record of about 1800 pages.

There is evidence tending to show that appellant was the owner of a valuable right in the land mortgaged, and that appellees Smoot and Eyer with Monk and Elliott, two other attorneys and J. Frank Tyrrell another attorney, acting for appellant as his attorneys at different times extending over many years in various litigations concerning the property took unfair and unwarranted advantage of him and his necessities and made unconscionable bargains with him, and that this decree inequitably deprives him of all benefit in the property and should not be allowed to stand. On the other hand there is evidence tending to show that the proposition from its inception was a prospect only, and not of any fixed ascertainable market value; that appellant was all the time a mature, intelligent business man and knew much more of the property than did the lawyers with whom he dealt, and was better able than they to judge of its present and future value; that the property was obtained by means of a long, arduo us, expensive litigation and the payment of a large sum of money, the burden of all of which was mainly borne by the lawyers; that the contracts made between appellant and his lawyers resulting in the indebtedness secured by the trust deed were, as now viewed, unfair to appellant, but did not so seemut the times when they were made because of the then mistaken view of the value of the land taken by all the parties concerned, and that such mistake is to be attributed not to

any fraud or misconduct of the lawyers but to an honest error of judgment in a business venture concerning which appellant had much more knowledge and means of information than did his attorneys.

In determining which theory of the case is to be adopted much depends on the weight given the testimony of appellant as a witness in the case. The master found his testimony entitled to little credit and adopted the second view of the facts, as did also the chancellor. Reading the record without the advantage of the master who saw many of the witnesses and heard them testify, we are inclined to the opinion that he was correct in his general conclusion of the merits of the case and in all his detailed findings necessary to support that conclusion.

The leading facts, either uncontradicted or supported by enough evidence to warrant their finding are; That in 1880 Hayes had a lease of the premises in question with an exp-option to purchase and was involved in some litigation in which he employed Smoot and Eyer as his attorneys; that the owner of the land sold it disregarding the option contract, and in 1890 a forcible entry and detainer suit was brought against Hayes. He employed Smoot & Eyer and Monk and Elliott to defend the suit and obtain a specific performance of his option contract. After a protracted litigation they won their first victory on a rehearing petition filed in Hayes v O'Brien et al 149 Ill. 403. the opinion was filed in March 1894, and January 23, 1895 they obtained a final decree of the trial court providing for a deed to Hayes on payment of $11100 by February 25, 1896. Meantime one Buckingham had obtained a judgment against Hayes for $1575 which was unsatisfied.

Hayes expected to get the money necessary to perform the

any fraud or misconduct of the lawyers but to an honest error of judgment in a business venture concerning which appellant had much more knowledge and means of information than did his attorneys.

In determining which theory of the case is to be adopted much depends on the weight given the testimony of appellant as a witness in the case. The master found his testimony entitled to little credit and adopted the remote view of the facts, as did the Chancellor. Possibly the strong point the advantage of the master who saw many of the witnesses and heard them testify, is too inclined to the opinion that he was correct in his general conclusion of the merits of the case and in all his detailed findings necessary to support this conclusion.

The leading facts, either uncontradicted or supported by strong evidence, [illegible] Hayes had a lease of the premises in question with an option to purchase and was involved in some litigation in which he employed Duncan and Lyon as his attorneys; that the owner of the land sold it during pending the option contract, and in 1890 a forcible entry [illegible] was brought against Hayes. He employed Duncan & Lyon and Millett to defend the suit and obtain a specific performance of his option contract. After a protracted litigation they won their first victory on a demurrer to petition filed in Hayes v O'Brien [illegible] 142 Ill. 400. The opinion was filed in March 1892, and January 22, 1893 they obtained a final decree of the trial court providing for a deed to Hayes on payment of $1100 by February 22, 1893. Meanwhile one Buckingham had obtained a judgment against Hayes for $1570 which was unsatisfied.

decree and could have done so if the property had any such commercial value as he supposed; but he failed to interest capitalists and found himself unable to raise the required funds. The master found the property was doubtful security for that amount, and the court found it was ample security. We are inclined to agree with the master and regard it as a property worth, according to the opinions of witnesses, very much more than people with money to invest could be induced to pay for it. The time was approaching when the money must be raised or the fruit of this long litigation be lost. And on Februaru 20, 1896 a written agreement was entered into by Hayes and the four attorneys in which it was, among other things recited: That Hayes is unable tocomply with the provisions of the decree and the attorneys agree to supply the money for that purpose, and Hayes agrees to secure them for their advances and solicitors' fees and admit them to share in the profits, and pursuant thereto has conveyed said property to Eyer as security, and agrees that said parties (the four attorneys) shall have the exclusive control and management of saidproperty with the right to sell at such times and on such terms as they may see fit, and that the proceeds of said land either by lease, mortgage sale of material or land, shall be applied: First; To payment of whatever sums of money said parties have advanced or may advance with interest at 7% payable semi annually. Second: To payment of solicitors' fees, one fourth of the net profits, not less however than $4000 nor more than $10000; the remainder if any to be divided between Hayes and said parties, Hayes to receive 21/32 and said parties 11/32 thereof. The master finds that this agreement was fair The Court finds that considering the relation of the parties it was not in all respects fair, reasonable and equitable, and that Hayes could have repudiated it and could now be

permitted to do so, but for his subsequent conduct in relation thereto. This difference ofviews between the master and the Court may naturally arise from their different conclusions as to the value of the land, and we are again inclined to the master's conclusion. Neither the court nor the master doubted from the evidence that Hayes fully understood this contract and entered into it freely and voluntrarily, and our reading of the record leads us to the same conclusion. Any right to question this contract that Hayes may be supposed to possess rests on the fact that he was then dealing with his attorneys with property that was the subject of litigation; but the law protecting clients in such transactions has much lessapplication in cases like this , where the doubtful questions are not concerning matters in which the attorneys have superior knowledge and in which the client naturally trusts his lawyers, but are concerning business propositions of which the client knows more than his attorneys and in which he would naturally exercise his own judgment.

Buckingham was pressing for payment of his judgment before mentioned, and Hayes executed an assignment of his interest in the contract to him as security for the payment of that judgment in consideration of an extension of payment of one year. There is a controversy as to the part taken in this transaction by Hayes and his attorneys respectively, but we think the master correctly found that Hayes executed the assignment freely and voluntarily and that it was for his advantage to make it.

Afterwards until August 3, 1905 this land was managed by the attorneys or some of them, expending much time and labor leasing and attempting to sell it, and Hayes participated and acquiesced in what was done and received from them sums of money from time to time. The attorneys ~~xxx~~ acted in good faith

permitted to do so, but for his subsequent conduct in relation thereto. This difference clearly proves the master wrong. The Court was naturally asked, from their different conclusions as to the value of the land, and we are again confined to the master's conclusion. Neither the court nor the master doubted from the evidence that Hayes fully understood this contract and entered into it freely and voluntarily, and our reading of the record leads us to the same conclusion. Any right to question this contract that Hayes may be supposed to possess rests on the fact that he was then dealing with his attorneys in the property that was the subject of litigation; but the law protecting clients in such transactions has much lessening application in cases like this, where the doubtful questions are not controlling matters in which the attorneys have supposed knowledge and in which the client naturally trusts his lawyers, but are concerning matters of which the client has knowledge, known more than his attorneys and in which he would naturally exercise his own judgment.

Buckingham was relying for payment of his judgment before contracted, and it was somewhat an abridgment of his interest in the contract to him as security for the payment of that judgment in consideration of an extension of payment of one year. There is a controversy as to the amount taken in this transaction by Hayes and his attorneys respectively, but we think the master correctly found that Hayes executed the assignment freely and voluntarily and that it was for his advantage to make it.

Afterwards until August 2, 1904 this land was occupied by the attorneys as such at law, expending much time and labor leasing and attempting to sell it, and Hayes participated and acquiesced in what was done and received from them some of

in the matter and kept strict accounts. Monk died in 1899. Hayes became dissatisfied with Smoot and Eyer in 1900 or 1901 and claimed that he had been defrauded by his attorneys and tricked into signing the contract of February 20 1896 and thereafter relations between Hayes and Smoot and Eyer were unfriendly, and early in 1902 Hayes employed J. Frank Terrill to take up the matter for him, and while Smoot and Eyer afterwards acted for Hayes in one or two other matters, there was not that feeling of trust and confidence on his part, that would induce him to rely much on their advice and counsel.

In June 1902, Buckkngham brought suit to foreclose his assignment of the contract and made Smoot and Eyer, Elliott and the representative of Monk, parties defendant. Smoot and Eyer refused to represent Hayes in the suit and he employed J. Frank Tyrrell to act for him, and answered admitting the Buckingham judgment, denying the amount due thereon, admitting the contract of February 20, 1896 and the deed to Eyer but denying knowledge of the assignment to Buckingham. There was a trial resulting January 23, 1903 in a decree in favor of Buckingham in which it was recited that the contract of February 20, 1896 was valid. There is a controversy whether this decree is res adjudicata on Hayes, and although the question of the validity of the contract was considered and passed upon in that case, we agree with the finding of the court below that it was not res adjudicata, because under the pleadings in that Buckingham case the rights of co-defendants as between themselves could not be finally adjudicated.

Hayes could not longer defer the payment of the judgment and he procured from appellee Patrick J. Ryan, $3000 for that purpose and January 8, 1903, assigned his interest in the contract to his attorney Tyrrell as security for the indebtedness to Ryan and Tyrrell's attorneys fees. There is much

controversy as to the transaction, Hayes claiming that the loan from Ryan was made under an agreement that he should pay Ryan ~~fmx~~ two to one for the amount advanced and for that reason the indebtedness was fixed at $6000 and was usurious Ryan and Tyrrell's representative claiming that the indebtedness was $6000 but that $3000 of it was to cover Tyrrell's charges for attorneys fees and disbursements.

About March 1905 Hayes desiring to get the title in his own name, entered into negotiations with Smoot and Ryer, (who had acquired the interest of Monk and Elliott) for that purpose, and on July 31, 1905 they furnished him with a complete statement of all money transactions concerning the matter. The negotiations resulted in an agreement that the interest of the four original attorneys in the land should be fixed at $35000 and the interest of Tyrrell at $6000. And an agreement to that effect after deliberate consideration and a full understanding of its terms entered into July 31, 1905 and a copy delivered to each of the contracting parties, and on the same date the necessary conveyances including the trust deed in controversy were executed and delivered.

On January 11, 1908 Hayes contracted to sell the land to one Kimball, who agreed to assume and pay the mortgage indebtedness of $31000 as a part of the consideration of $400 an acre to be ascertained by a survey of the land, and soon thereafter a deed was made with an expressed consideration of $80,000 to be in part paid by the grantee assuming and paying said indebtedness. A small payment in cash was made and interest bearing notes aggregating over $0,000 secured by a mortgage on the premises, were delivered to Hayes to secure the payment of the balance of the purchase price.

This seemed a very happy outcome of this long drawn out transaction, and Hayes appeared to have a reasonable part of the

proceeds, giving the contracts that led up to this ~~xxix~~ and quite a different aspect from that in which they are viewed as relating to property of much less value. But it was not money that Hayes received for the land, and apparently not t he equivalent of money, and the whole affair became of little importance in this investigation, except for the argument of appellees that Hayes in so selling and conveying the land and providing for the payment of this mortgage debt, estopped himself from here questioning its validity and amount. Without much considering this question, we give appellant the benefit of his contention that it does not so estop him, by not resting our decision at all on that ground.

Appellant calls our attention to many authorities in support of his proposition that the onus of proof is upon the attorney to show fairness, adequacy, and equity; that the attorney is not permitted to make any profits out of the employment, other than his due compensation, but adds that it is not impossible for an attorney to bargain with his client after the forming of that relation, but the burden is upon him to prove fairness etc. We have considered the case with that law in view, and are of the opinion that the evidence affirmatively shows that the conduct of Smoot and Eyer and Monk and Elliott was in all respects fair, even when judged by the rule applied to the dealings of parties acting in a fiduciary capacity. If we did not take that view, and were disposed to hold that the original contract was open to attack because of the relation existing between the parties, still we would agree with the chancellor, that subsequent contracts, including those made as a part of this trust deed transaction operate as a ratification of the original contract, at a time and under circumstances that leave the transaction free from any suspicion of fraud or undue influence. There is more doubt of the con-

proceeds, giving the contracts that had up to this week and quite a different aspect. Upon that in which they are usual as relating to property of much less value. But it was not money that Hayes received for the land, and therefore not a payment of money, and the whole difficulty remains. I little importance in this investigation, and I for the expression of opinions that Hayes in so selling and conveying the land provided for the payment of this mortgage debt, assumed himself from his questioning his validity in amount. Without much considering this question, we have arrived the benefit of the contention that it does not be also, by not vesting our decision on this point.

A point of in our attention to only authorities in support of this proposition that the mere of sound is when the attorney to show fairness, adequacy, and exactly such as ought to be not permitted to make any platform out of the money, other than his due compensation, but note that it is not impossible for an attorney to purchase. He has right after the passing of that relation, but the burden is upon him to prove fairness etc. We have considered the case from each side in view, and are of the opinion that the evidence sufficiently shows that the conduct of Smoot and Hyer are open and fairness in the private deal, even when judged by the rule applied to the dealings of parties acting in a fiduciary capacity. We do not take that view, and very doubtful to hold that the original contract was open to attack because of the relation existing between the parties, still we would agree with the commission, that subsequent conference, including those made as a part of this great land transaction operate as a rescission of the original contract, or rather the contract

appears that since the transaction free from any violation of fraud or undue influence. If one in some degree [illegible]

sideration of the $6000 note. A large amount of legal service was rendered by Tyrrell for Hayes, and he also procurred for him the loan of $3000; but it is not clear that an attorneys fee of $3000 was justified by anything that he did for Hayes. Still the evidence shows that Hayes agreed to pay that fee, and long afterwards ratified that agreement by giving the note in question. A reasonable attorneys fee may depend somewhat on whether it is to be paid in money or in some property of doubtful value. Contingent fees for a much larger amount than would be justified if the agreement was to pay in any event are sanctioned by law, thus allowing the attorney some compensation for the risk of receiving nothing. Where the fee is not fixed at the time of the employment perhaps an attorney may reasonably be compensated, to some extent, not only for his skill and labor but also, in cases where his fee depends on the result of the suit, for the risk of receiving no compensation. In this case the attorneys were performing services for which they might receive no pay, and were settling with their client by taking property that could not be readily converted into money. We are not disposed to disturb the finding of the master and the decree of the chancellor sustaining the consideration of the $6000 note.

There are many assignments of error; we have disposed of all of them that we regard of controlling importance. The chancellor after overruling exceptions to the masters report, of his own motion changed some of the findings; he also struck out some of the allegations in the pleadings. This was irregular, but we do not see that it harmed appellant.

Appellees have assigned cross error that the chancellor allowed them only $750 solicitors fees, while the master recommended $1500 and the evidence sustained that amount. We are not inclined to disturb that finding. The standard of attorneys

fees varies in different localities. The trial judge is usually familiar with the usual and ordinary charges made by attorneys practicing in his court, and he is permitted to act on his own knowledge and judgment, as well as the evidence in the case.

The decree is affirmed.

Whitney J. took no part

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

R. H Dunn Oct 8/14

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5933.

Bettie D. Kelly, appellant.

vs Appeal from Co. Ct. Woodford.

Stary M. Hakes, appellee

Carnes, P. J.

Appellant Bettie D. Kelly was the owner of a crippled mare pony, a family pet. She was about to leave the neighborhood and made some arrangement with appellee Stary M. Hakes, to care for the pony and breed her. The evidence is contradictory as to what that agreement was, but it is certain that among its provisions appellee was to bear some of the expense in case the effort to breed the mare was successful and have a half interest in the colts so produced. The result of the effort was that a short time before this suit was brought the mare had two colts, one a few weeks old and the other about a year old ~~and the other~~ all in the possession of appellee. The son of appellant, acting for his mother, then entered into negotiations with appellee for a settlement of the claims of the parties in the property, and claims it was then agreed that appellee should receive $100 for his interest in the colts and should thereupon surrender possession of them and the pony. The evidence is conflicting as to whether a definite agreement was then reached; but appellant on the assumption that there was, undertook to tender appellee $100 the validity of the tender is questioned. Not succeeding in getting possession of the property in that way, appellant brought this action of replevin, for the mare and colts, in the county court, where it was tried without a jury on issues that both parties say raised the question of the right of immediate possession. The court found from the evidence that appellant was entitled to the possession of the mare, and appellee to the possession of the colts, and entered judgment accordingly, and ordered a writ of retorno habendo for the

Geo. E. Cone.

Hattie E. Kelly, Appellee.

vs.

Appeal from Co. Ct. Lawrence.

Grant E. Cone, Appellee

Crane, P. J.

Appellant Hattie D. Kelly was the owner of a quieting mare pony, a family pet. Mr. Cone sought to leave the neighborhood and made some arrangement with appellee Kelly E. Hatie, to care for the pony and travel him. The evidence is contradictory as to what that arrangement was, but it is certain that among its provisions appellee was to have possession of the mare in case the effort to breed the mare was successful and have a half interest in the colt to produce. The result of the effort was with a short time after this suit was brought the mare had two colts, one a few days old at the date about a year old and the suit at bar is a controversy of equities.

The son of appellant, acting for his mother, then entered into negotiations with appellee for a settlement of the claims of the parties in the property, and claims it was agreed that appellee should receive $100 for his interest in the colts and should thereupon surrender possession of them and the pony. The evidence is conflicting as to whether a definite agreement was then reached; but probably on the assumption that there was, application to tender $100 was made. The validity of tender is questioned. Not succeeding in getting possession of the property in this way, appellant brought this action of replevin, for the mare and colts, in the county court, where it was tried without a jury on issues that both parties may raise the question of the right to immediate possession. The court found from the evidence that appellant was entitled to the possession of the mare, and appellee in the possession of the colts, and entered judgment accordingly. Appellee's motion for a new trial being overruled, he prosecuted a writ of error to the

return of the colts; and on motion of appellant ordered the costs apportioned, and that appellant pay five eights and appellee three eights thereof; from which judgment this appeal is prosecuted. Appellee assigns cross errors that the court erred in awarding the possession of the mare to appellant and in apportioning costs and in taxing any costs against appellee.

The evidence sufficiently supports a finding that each of the parties owns a half interest in the ~~xxxx~~ colts to, at least, prohibit us from disturbing that conclusion of the trial court, who saw the witnesses and heard them testify . And for the same reason we are not disposed to reverse the judgment on the ground that there was a settlement and tender, or on the ground that the evidence does not show appellant entitled to the possession of the pony. Neither are we disposed to question the order apportioning costs. In most jurisdictions, including this State, the general rule that the prevailing party is entitled to costs is not applied in replevin cases where the plaintiff fails to recover all the property replevied. 34 Cyc. 1557 citing Lansing v Bates, 11 Ill. 550; in which it is said that in such case each party is entitled to recover his costs of the other. We do not find that case cited in later cases and do not find the Statute changed since that decision so as to affect that question. But counsel only argue the question on ~~x~~ the theory that the court was not authorized to apportion costs in any way and do not complain of the manner, if the court was entitled to apportion them at all. It is not pointed out what the ~~xxxx~~ ~~xf~~ costs of each party were. The order may have resulted in requiring the payment of each party of the costs of the other.

It follows that the judgment was right in awarding

return of the costs; and on motion of appellant ordered the [illegible]

[illegible] in proceeding. Appellee assigns cross errors that the court erred in awarding the possession of the cows to appellant and in apportioning costs and in taking any costs against appellee.

The evidence sufficiently supports a finding that each of the parties owns a half interest in the cows; or, at least, prohibits us from disturbing that conclusion if the trial court, who saw the witnesses and heard them testify, did so. [illegible]

reverse the judgment on the ground that there was a settlement and tender, or on the ground that the evidence does not show appellant entitled to the possession of the cows. Neither are we disposed to question the order apportioning costs. In most jurisdictions, including this State, the general rule that the prevailing party is entitled to costs is not applied in replevin cases where the plaintiff fails to [illegible]

Bates, 11 Ill. 559; in which it is said that in such case each party is entitled to recover his costs of the other. We do not find that case cited in later cases, and do not [illegible] that question. But counsel only argue the question on the theory that the court was not authorized to apportion costs in any way and do not complain of the manner, if the court was entitled to apportion them at all. It is not pointed out what the costs of each party were. The order may have resulted in requiring the payment of each party of the costs of the other.

[illegible]

appellee the possession of the colts; the law is well settled that a part owner of a chattel is entitled, if he has possession to keep it, as against the other part owner. But lest some question arise as the right of property in the colts the judgment will be affirmed with a finding that appellant is the owner of one half interest in them.

The judgment is affirmed.

Finding of facts.

We find that the property in the mare in question is in appellant, and that the property in the colts in question is one-half in appellant and one-half in appellee.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. CHARLES WHITNEY, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

Re Hearing Denied Oct 8/14

BE IT REMEMBERED, that afterwards, to-wit: on the 31st day of July, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5936.

Pearl Berry, appellee

vs Appeal from ~~Kane~~ Lake.

Edwin W. Berry, appellant.

Dibell, J.

This is a bill for separate maintenance, filed in July 1913, in the circuit court of Lake County by Pearl Berry against her husband, Edwin W. Berry. The latter filed an answer specifically denying all the material allegations in said bill. Upon a trial before the court, there was a decree in favor of the complainant, granting her separate maintenance and alimony of $10. per week for the support of herself and her infant child, and giving her the custody of such child. A subsequent order allowed the complainant the sum of $50 as her reasonable solicitors' fees, to be paid by the defendant. Prior to the decree complainant below petitioned the court in this cause for a writ of ne exeat against said defendant, which was granted, and the defendant gave bonds for his appearance and obedience to future orders of court. Defendant below appeals.

The evidence introduced by appellee tended to show that her husband had subjected her to much cruel, inhuman and indecent treatment, which we do not deem it necessary to detail in this opinion; that he had sought to compel her to live in a house in Kenosha, Wisconsin, which was unfit for human occupancy; and that he had not properly provided her with necessaries, according to their station in life. The evidence introduced by defendant tended to show that these charges were untrue and that complainant was lazy, fault-finding and easily dissatisfied. The chancellor saw and heard the witnesses and evidently believed those produced by the appellee, and we can find nothing in the record that would justify

us in holding his conclusions erroenous. We are satisfied there was sufficient evidence to support the contention of appellee that she should be maintained separate and apart from her husband.

Upon the subject of appellants income, he testified that he was the representative, in Kenosha, of the Waukegan Tea Company, and apparently he was a partner therein, and said firm was doing a gross business there of about $1,000 per month. His evidence is rather indefinite and confusing but, apparently, the business has been financed by one Taplan and appellant was endeavoring to pay Taplan back out of the monthly proceeds. Appellant claimed that he did not make more than $50 per month for himself, and that the business has been losing money. In spite of this alleged fact, however, appellant has been able to support his family and, as he will not require so much money for himself now that his wife and child are living apart from him, we are satisfied that the court made no mistake in allowing his wife the sum of $10 per week for her maintenance and that of the child. Besides, the amount of alimony to be paid by appellant is at all times subject to the control of the court and may be decreased if it should later prove to be excessive. We do not consider that the allowance of a solicitors' fee of $50 for complainant was excessive, in view of the services required and rendered, and we have no doubt as to the authority of the court to make such an allowance. The child was about three years old at the time the order was entered giving its custody to appellee, and we have no doubt that the interest of the child ~~xxxxxx~~ required that it be entrusted to the care of its mother at such a tender age.

The record shows that appellant was a resident of the state of Wisconsin and had been for about two years, and

that most of his property interests were in that state. It would therefore be a simple matter for him to nullify the orders and decrees of the court below and to escape maintaining his wife and child, were it not for the writ of ne exeat which was issued in this cause upon the petition of appellee. Our statute recognizes a writ of ne exeat as an equitable remedy, to be administered in courts of chancery upon bill or petition. Such a writ was issued before decree in Mac Kenzie v Mac Kenzie, 141 Ill. App. 136, a separate maintenance case. In Denton v Denton, 1 Johns Chy. 364, a bill for divorce and alimony, Chancellor Kent said; "The allowance of a ne exeat, when the husband threatens to leave the State and his wife without any support, is essential to justice and has been granted in like cases."(citing English cases.) The writ was granted. Afterwards, in the same case, (1 Johns Chy. 441) on a motion to discharge the order, the court sustained the writ, cited other English cases, and cited Lord Hardwicke as holding that the ne exeat had been granted in the single case of alimony, out of compassion to the wife. The husband was permitted to depart the state on giving bond to abide the decree (not yet rendered,) or to return within one year after the decree, so as to be amendable to the process of the Court. In the case at bar the only order for a writ of ne exeat was endorsed upon the petition. Appellant did not answer nor demur to the petition or move to quash the writ but immediately gave a bond with approved security, conditioned that he would not depart the State without leave of court, and that he would render himself in execution to answer any decree the court might render against him. The bond in its practical effect only operated as security for the payment of the alimony thereafter to be decreed. The appeal bond given by appellant recites his appeal from a decree for separate maintenance and for attorneys' fees and costs of suit

and custody of the child. It does not recite an appeal from the separate orders for a writ of ne exeat. As this record does not show that a ellant questioned the writ in the court below or asked to have the bond discharged, and as he did not appeal upon that subject, we are not required to decide whether the very equitable and necessary action approved by Chancellor Kent is beyond the powers of the court in this state because not within the exact letter of our statute authorizing the writ of ne exeat.

The decree is affirmed.

Whitney, J. took no part.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirty-first day of July, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

5914 60

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. , Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

190 I.A. 233

No appellees brief filed

BE IT REMEMBERED, that afterwards, to-wit: on the 13th day of October, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5914.

Richardson Silk Company, appellee.

vs Appeal from Co. Ct. Winnebago.

D. Raymond Mead, appellant.

Dibell, J.

This was an action in assumpsit brought by the Richardson Silk Company in March, 1913, against D. Raymond Mead, to recover the sum of $206.00 as the price of two silk cabinets which the Richardson Silk Company claimed to have sold to Mead sometime before the commencement of this suit. The declaration consisted of four counts. The first and second counts charged that the defendant wasindebted to the plaintiff in the sum mentioned for goods and chattels, wares and merchandise, sold and delivered to the defendant at his special instance and request; the third count was based upon a quantum meruit; and the last was the consolidated common counts. The items of the statement filed with the declaration xxxx were as follows: "1 Special Silk Cabinet $72.50; 1 Special Display Cabinet $133.50". With the declaration was filed the plaintiff's affidavit of claim. The defendant filed a plea of general issue accompanied by an affidavit of merits, and upon a jury trial there was a verdict in favor of plaintiff for $25.00. A motion by defendant for a new trial was overruled and judgment was entered upon the verdict, from which the defendant below appeals.

The evidence shows that in the early part of the year 1909 one I. L. Cutting, then in the dry goods business in the City of Rockford, ordered the two cabinets in question from the Richardson Silk Company, and that these cabinets were built in or fitted into a partcular space in his store, and were to be retained with their silks in his store, and then were to be returned to him. Later, but whether in 1910 or 1911

m. No. 8914.

hardson Silk Company, appellee.

vs Appeal from Co. Ct. Winnebago.

Raymond Mead, appellant.

bell, J.

This was an action in assumpsit brought by the Richardson
ilk Company in March, 1913, against D. Raymond Mead, to re-
over the sum of $208.00 as the price of two silk cabinets
ich the Richardson Silk Company claimed to have sold to
ed sometime before the commencement of this suit. The
claration consisted of four counts. The first and second
unts charged that the defendant was indebted to the plaintiff
the sum mentioned for goods and merchandise, were and mer-
andise, sold and delivered to the defendant at his special
stance and request; the third count was based upon a quantum
nit; and the last was the consolidated common counts. The
ons of the statement filed with the declaration were
follows: "1 Special Silk Cabinet $74.50; 1 Special Display
binet $133.50". With the declaration was filed the plaintiff's
fidavit of claim. The defendant filed a plea of general issue
commanded by an affidavit of merits, and upon a jury trial
ere was a verdict in favor of plaintiff for $98.00. A motion
defendant for a new trial was overruled and judgment was
tered upon the verdict, from which the defendant below appeals.

The evidence shows that in the early part of the year
09 one I. L. Outting, then in the dry goods business in the
ty of Rockford, ordered the two cabinets in question from
e Richardson Silk Company, and that these cabinets were
ilt in or fitted into a particular space in his store, and
re to be returned to him. Later, but whether in 1910 or 1911

the record does not clearly show , Cutting sold all of the store fixtures, good will, etc., of his business to Dimond & Co. and delivered possession of everything, including these cabinets. Thereafter an agent of appellee was in the store and knew that Dimond & Co. were in possession of these cabinets but took no steps to recover them or to protect appellee's interest therein. Later, in 1912, appellant purchased the lease and fixtures of said building and business, and received from the Dimond Company an assignment of said lease and a bill of sale which purported to include all fixtures and furniture in the building, except one cash register, five show cases, five shoe chairs and two oak counters. These cabinets were not excepted. He paid the Dimond Company for the property he so purchased. Appellant then sold one of these cabinets to one person for $10. and the other to another person for $15. and collected the pay. After that Cutting told appellant that these two cabinets were the property of appellee. Cutting testified that appellant then promised to communicate with appellee concerning them. This testimony of such a promise by appellant is contradicted and is not proven by a preponderance of the evidence. After appellant had purchased and taken possession of the store and had sold and been paid for these two cabinets, he received a bill from appellee charging these cabinets to him in the sum of $206. and accompaning this bill was a letter in which appellee stated that it had been informed by its salesman that appellant had disposed of a couple of silk cabinets belonging to it, which had come to his possession, and asking him to remit for the enclosed bill. Appellee had never before demanded the cabinets of appellant nor of the Dimond Company, and apparently the bill and letter above referred to were the first knowledge appellant had of any claim by appellee to the cabinets or to the price

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o. and delivered possession of everything, including these
abinets. Thereafter an agent of appellee was in the store
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ad come to his possession, and asking him to remit for the
nclosed bill. Appellee had never before furnished the cabinets
o appellant nor of the Dimond Company, nor apparently the bill
nd letter above referred to were the first knowledge appellant
ad of any claim by appellee to the cabinets, or to the order

thereof. There was evidence that these cabinets were not sold outright to Cutting by appellee but were shipped to him or consigned, which appeared to mean that he was allowed to use them in his store as long as he continued to buy silk of appellee. Appellee claims that the possession and sale of these cabinets by appellant constituted a tort, but there is no proof of such tort by appellant, and if there were it has waived the tort by bringing suit here in assumpsit.

If, under the circumstances, these two cases belong to the Richardson Silk Company and if it could have secured them by replevin or could have brought an action against Mead in trover and thereby have recovered the full value of the cabinets, or could have maintained an action in assumpsit for the amount appellant received when he sold them, w without regard to their value, still appellee chose none of these courses. It proceeded to charge the full cost price of these cabinets to appellant and, on his failure to pay, brought this action to recover the value of the cabinets. Under the evidence appellee could only do this successfully upon the theory that Mead had purchased the cabinets from it. In effect this petition taken by the Richardson Silk Company made Diamond & Company its agents in the matter and ratified the sale of these cabinets by Dimond & Company to Mead. Dimond & Company not only sold the cabinets to appellant, but received payment in full from appellant for them, and we can find nothing in the record upon which to base any contract liability of appellant to pay appellee for these cabinets Appellee cannot ratify the sale of themby Dimond & Co. and reject the payment thereof by appellant to Dimond & Co. Appellee has filed no briefs here and we are deprived of its assistance in seeking a full understanding of this case, but we are unable to perceive any ground on which Mead could be held

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d outright to Cutting by appellee but were shipped to him
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s filed no briefs here and we are deprived of its assist-
ce in assuring a full understanding of this case, but we are

liable to the Richarason Silk Company under the pleadings and the proof. Whether it has a right of action in contract or tort against Cutting or Dimond & Co. it is not our province to decide in this suit against Mead.

The judgment is therefore reversed.

(Finding of facts to be incorporated in the judgment)
We find that appellantis not indebted to appellee for the cabinets for the price or value of which appellee brought this suit against appellant.

liable to the Richardson Silk Company under the pleadings and the proof. Whether it has a right of action in contract or tort against Cutting or Diamond & Co. it is not our province to decide in this suit against Mead.

The judgment is therefore reversed.

(Finding of facts to be incorporated in the judgment)

We find that appellants not indebted to appellee for the merchandise for the price or value of which appellee brought this suit against appellant.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirteenth day of October, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. , Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 13th day of October, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 5938

Joseph Dux, appellee

vs Appeal from Lake.

Marion D. Rumsey, et al
appellees.
(James A. Miller & Brother,
appellants)

Dibell, J.

In the same suit for a mechanic's lien described in Gen. No.5937 Dux v Rumsey, in which we file an opinion this day, James A. Miller & Brother were also sub-contractors and filed an amended answer in the nature of a cross petition, seeking for a lien for $1838.00. A like demurrer by the owner and her husband was sustained, and these sub-contractors elected to abode by their amended answer and cross petition, and the same was dismissed for want of equity and they perfected this appeal.

The sub-contract under which these appellants acted was substantially the same as the one of the White City Electric Company, involved in said other cause, except as to the nature of the work and the amount to be paid therefor; and the cases are practically alike, except that the original contract between the owner and the contractor is not set out in the present record. No briefs or abstracts were filed in this cause, but it was submitted upon the briefs and abstracts filed in the other case. For the reasons stated in the opinion in that case the decree is affirmed.

Whitney, J. took no part.

[illegible] No. [illegible]

[illegible] Mun. [illegible]

vs

Appeal from [illegible].

[illegible]ion D. Dunsey, et al
appellees.
[illegible]rge A. Miller & Brother,
appellants)

[illegible]bell, J.

In the same suit for a mechanic's lien described in Gen. No.3027 Dun v Dunsey, in which we file an opinion this day, James A. Miller & Brother were also sub-contractors and filed an amended answer in the nature of a cross petition, seeking for a lien for $1238.00. A lien claimed by the owner and her husband was sustained, and these sub-contractors asked to abide by their amended answer and cross petition, and the same was dismissed for want of equity and they prosecuted this appeal.

The sub-contract under which these appellants acted was substantially the same as the one of the White City Electric Company, involved in said other cause, except as to the nature of the work and the amount to be paid therefor; and the cause is practically alike, except that the original contract between the owner and the contractor is not set out in the probably record. No briefs or abstracts were filed in this cause, but it was submitted upon the briefs and abstracts filed in the other case. For the reasons stated in the opinion in that case the decree is affirmed.

Mathney, J. took no part.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirteenth day of October, in the year of our Lord one thousand nine hundred and fourteen.

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. , Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 13th day of October, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 5932.

Peter Fippinger, appellant,	)	
	)	
vs.	)	Appeal from Dupage.
	)	
Henry F. Glos, appellee	)	

Opinion by DIBELL / J/

On September 2, 1911, Peter Fippinger and four other members of his family were riding east on a highway in the village of Bellwood, which was neither a closely built up business portion nor a residence portion thereof, in a surrey drawn by a single horse and driven by a son of Fippinger under 17 years of age, and at the same time Henry F. Glos, a nephew of Fippinger, was driving an auto-truck operated by a gasoline motor and going west on the same highway. They were on a turnpike and there was a ditch about four feet deep on each side. As these conveyances approached each other, the horse went into the ditch and the surrey with him and the latter was overturned, and Fippinger claims that he was injured thereby. Fippinger sued Glos to recover damages for said injury. At the first trial plaintiff had a verdict for $2,500. At a second trial defendant had a verdict and a judgment for costs and plaintiff appealed.

Of the merits it is sufficient to say that the evidence on the material points was very conflicting; that, if the evidence introduced by plaintiff was true, it fairly tended to make a case for him, and, if the evidence introduced for defendant was true, plaintiff clearly had no cause of action.

m. Over.

Peter Tippinger, appellant,
vs.
Henry A. Shaw, appellee

} Appeal from Dupage.

O P I N I O N A N D O R D E R

On September 8, 1911, Peter Tippinger and four other members of his family were riding east on a highway in the village of Lombard, which was neither a closely built up business portion nor a residence portion thereof, in a buggy drawn by a single horse and driven by a son of plaintiff, with plaintiff in it, and at 111 and 113 Lombard Ave. Shaw, a driver of Tippinger, was driving in west-bound direction by a gasoline motor and going west on the same highway. They were on a turnpike and there was a ditch about four feet deep on each side. As the conveyances approached each other, the horse went into the ditch and the surrey with him and the latter was overturned, and Tippinger claims that he was injured thereby. Tippinger sued Shaw to recover damages for said injury. At the first trial plaintiff had a verdict for $2,500. At a second trial defendant had a verdict and a judgment for costs and plaintiff appealed.

Of the merits it is sufficient to say that the evidence on the material points was very conflicting; but, if the evidence introduced by plaintiff was true, it was quite improper to make a case for the jury. That, if the evidence introduced for defendant was true, necessarily merely was an issue of fact.

There was proof for plaintiff tending to show that just before the accident, defendant was driving the auto-truck at a speed of between 20 and 25 miles per hour. Defendant introduced proof that he was driving at the rate of 6 to 7 miles per hour. He also introduced proof of several experiments , some made by experts, as to the speed at which this auto could be driven, and one of these witnesses testified that he could not drive it at a speed exceeding 12 miles per hour, and another that he was able to make 15 miles per hour, and another 18 or 20 miles per hour. Plaintiff, contends that this evidence was incompetent, because the conditions were not shown to be the same. The rule governing this subject is thus stated in 4 Chamberlayne on the Modern Law of Evidence, section 3168: "Identity of circumstances is not required for the admission of proof of the similar occurrence; the administrative power may be exercised in receiving the evidence if the conditions of the two occurrences are essential ly similar. The greaterthe similarity, however, the more probative ~~exa~~ gorce attaches to the collateral occurrence. Admitting the evidence is merely a preliminary ruling by the court and involves no finding as to the credibility or weight of the testimony. It amounts to a finding that the jury may reasonably receive the evidence and act upon it. " Upthegrove v. Chicago Great Western Ry. Co., 154 Ill. App. 460. It was more than nine months after the accident before defendant was served with summons, and it was practically impossible to then reproduce the exact conditions. Obviously, it aws not necessary that the essential simil-

There was proof for plaintiff tending to show that just before the accident, defendant was driving the auto-truck at a speed of between 20 and 25 miles per hour. Defendant introduced proof that he was driving at the rate of 4 or 5 miles per hour. He also introduced proof of several experiments, some made by experts, as to the speed at which this auto could be driven, and one of these witnesses testified that he could not drive it at a speed exceeding 12 miles per hour, and another that he was able to make 15 miles per hour, and another 19 or 20 miles per hour.

Plaintiff, contends that this evidence was incompetent, because the conditions were not shown to be the same.

The rule governing this subject is thus stated in 4 Chamberlayne on the Modern Law of Evidence, section 3168: "Identity of circumstances is not required for the admission of proof of the similar occurrence; the administrative power may be exercised in receiving the evidence if the conditions of the two occurrences are essentially similar. The greater the similarity, however, the more probative dwns force attaches to the collateral occurrence. Admitting the evidence is merely a preliminary ruling by the court and involves no finding as to the credibility or weight of the testimony. It amounts to a finding that the jury may reasonably receive the evidence and act upon it."

[illegible]

Before defendant was served with summons, one it was practically impossible to them represent the exact conditions. Obviously, it was not necessary that the essential simil-

arity of the conditions should be shown by the men who made the experiment. We are of opinion that it was shown here by other witnesses that the conditions were substantially the same. If there was any difference, the road upon which the experiment was made was smoother than the road upon which the accident happened. But this would tend to enable the auto-truck to run faster when the experiment was made than when the accident ocurred, and this was favorable to plaintiff. We find no reversible error in these rulings.

Plaintiff, who was over 60 years of age, showed by himself and by physicians certain physical conditions thereafter existing in himself which he attributed to this accident. The defense showed that, not many years before the accident, plaintiff had had a serious and protracted illness and showed the nature thereof. Physicians were permitted to testify for defendant what in their opinion could have produced the conditions which plaintiff claimed to be suffering from after the accident. It is argued that the admission of this testimony was erroneous. These questions we consider justified by the principles laid down in City of Chicago v. Didier, 227 Ill. 571, Chicafo Union Traction Co. v. Ertrachter, 228 Ill/ 14, and Shaughnessy v. Holt, 236 Ill. 485. In the Ertrachter case, exactly such questions in principle were sustained.

Section 10 of the Act of June 10, 1911, relating to motor vehicles, in force when this accident ocurred, enacts that no person shall drive a motor vehicle on any public highway in this State at a speed greater than is reasonable and proper, having regard to the traffic and the use of the

*

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Plaintiff, who was over 60 years of age, showed by himself and by physicians certain physical conditions thereafter existing in himself which he attributed to this accident. The defense showed that, not many years before the accident, plaintiff had had a serious and protracted illness and showed the nature thereof. Objections were permitted to testify for defendant what in their opinion could have produced the conditions which plaintiff claimed to be suffering from after the accident. It is argued that the admission of this testimony was erroneous. These questions we usually justified by the rule that a witness may not testify to things v. Shirley, 237 Ill. 271, citing Union Protection Co. v. Hitchcock, 228 Ill. 14, and Shaughnessy v. Holt, 236 Ill. 489. In the Hitchcock case, exactly such questions in principle were sustained.

Section 10 of the Act of June 10, 1911, relating to motor vehicles, in force when this accident occurred, enacts that no person shall drive a motor vehicle on any public highway in this State at a speed greater than is reasonable and proper, having regard to the traffic and the use of the

way, or so as to endanger the life or limbor injure the property of any person; that, if the rate of speed of any motor vehicle upon any public highway in this State, outside the closely built up business portions and the residence portions, within any incorporated village exceeds 20 miles per hour, such rate of speed shall be prima facie evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person. The court refused instructions numbered 1, 2, 3 and 4, requested by plaintiff, and of its own motion gave an instruction No. 1, in place of No. 1 so offered. It is argued that these rulings are erroneous. The first instruction stated and applied the provisions of said section 10, and the fourth instruction offered was also drawn under said section. Instruction No. 1 prepared by the court and given, embraced many but not all of the elements of said refused instructions, and it did not tell the jury, as instruction No. 1 refused whold have done, that running a motor vehicle at the place in question at a speed of more than 20 miles per hour was prima facie evidence that that rate of speed was greater than was reasonable and proper. Said refused instruction 1 and 4 fairly stated the statute and should have been given, if such a case was stated in the declaration. The original declaration contained seven counts. A demurrer was sustained to all but the first, second and seventh counts. Plaintiff took leave to amend his declaration . Instead of so deing, he filed an amended declaration, which we construe as an abandonment of the

ay, or so as to endanger the life or limbs or injure the
roperty of any person; that, if the rate of speed of any
[illegible] within any village or city, [illegible]
a closely built up business portions and the residence portions
tions, within any incorporated village exceeds 30 miles
er hour, such rate of speed shall be prima facie evidence
t the person operating such motor vehicle is running at
te of speed greater than is reasonable and proper,
ving regard to the traffic and use of the way or so as to
anger the life or limb or injure the property of any
erson. The court refused instructions numbered 1, 2, 3
d 4, requested by plaintiff, and if its was having done
instruction No. 1, in case of [illegible], is affirmed. It is
ssumed that these rulings are erroneous.

[illegible]
, and the fourth instruction offered was also drawn under
aid section. Instruction No. 1 prepared by the court and
iven, embraced many but not all of the elements of said
efused instructions, and it did not tell the jury, as
nstruction No. 1 refused should have done, that running a
otor vehicle at the place in question at a speed of more
han 20 miles per hour was prima facie evidence that that
ate of speed was greater than was reasonable and proper.
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it should have been given. If such a case was stated in
he declaration. The original declaration contained
seven counts. A demurrer was sustained to all but the first,
second and seventh counts. Plaintiff took leave to amend
his declaration. Instead of so doing, he filed an amended
declaration, which we construe as an abandonment of the

original declaration. We will refer to the amended declaration as the declaration. It contained eight counts. While they variously stated the surrounding conditions and the duty of the defendant, yet most of them, as to the negligence of the defendant which caused the injury, alleged that defendant so carelessly, negligently and improperly ran his motor vehicle upon said public highway that through the negligent, improper and careless conduct of the defendant the horse was frightened and ran into the ditch and produced the injury. Some counts also charged that the motor made loud and unnecessary and unusual noises, which frightened the horse, and others, that it exhausted large, unusual and unnecessary quantities of smoke, vapor and steam, which frightened the horse. The fifth count charged that defendant drove siad truck at "a high, excessive, unreasonable and dangerous rate of speed, to-wit, at the rate of 30 miles per hour," and that by means thereof the horse was frightened. Theinsertion of the videlicet made this not a charge that this vehicle was driven at any particular number of miles per hour, but permitted the pleader to prove at the trial any rate of speed. Rose v. Mutual Life Ins. Co., 144 Ill. App. 434; 1 Chitty's Pl. 318. If plaintiff had intended to charge in this count that this vehicle was driven at a speed exceeding 20 miles per hour, in violation of section 10 of the statute above referred to, the allegation should have been positive. Plaintiff also filed an additional count, but it did not use any other terms in describing the negligence of defendant. This declaration, therefore, nowhere charged that defendant drove this truck at a speed greater than was reasonable and proper, having

-riginal declaration. We will refer to the amended declar-
-ion as the declaration. It contained eight counts.
-ile they variously stated the surrounding conditions was
-duty of the defendant, yet most of them, as to the
-ligence of the defendant which caused the injury, alleged
-t defendant so carelessly, negligently and improperly ran
-motor vehicle upon said public highway that it came in
-ligent, improper and careless conduct of the defendant
-horse was frightened and ran into the ditch and produced
-injury. Some counts also charged that the motor made
-d and unnecessary and unusual noises, which frightened
-horse, and others, that it negligently large, alleged and
-unnecessary quantities of smoke, soot and steam, also
-ightened the horse. The fifth count charged that
-fendant drove said truck at "a high, excessive, unnecess-
-able and dangerous rate of speed, to-wit, at the rate of
-miles per hour," and that by reason thereof the horse was
-ightened. The insertion of the vituperative more this not
-harge that this vehicle was driven at any particular
-ber of miles per hour, but permitted the plaintiff to prove
-the trial any rate of speed. Jones v. Mutual Life Ins. Co.,
-Ill. App. 111; Schlitz v. Ill. Cent. R. R. Co.
-d intended to charge in this count that this vehicle was
-iven at a speed exceeding 25 miles per hour, in violation
-section 10 of the motor vehicle above referred to, the
-legation should have been positive. Plaintiff also
-led an additional count, but it did not use any other terms
-describing the negligence of defendant. This declaration,
-liberally, contains general and conclusory [illegible]
-a speed greater than was reasonable and proper, having

regard to the trafic and the use of the way or so to endanger the life or limb or injure the property of any person or at a speed exceeding 20 miles per hour, and we therefore conclud that he was not entitled to have said statutestated to the jury further than it was embraced in the instruction which the count gave to the jury of its own motion. Instruction No. 3 sought to define "proximate cause." These words are in fairly common use in the English language, and were defined in given instruction as " the immediate or real cause of the injury;" while said third refused instruction contained this language: "without an intervening efficient cause, " which words were less likely to be understood by the jury than the words "proximate cause." One instruction given for defendant is subject to just criticism, but we conclude its unaccuracy is not sufficient to require a reversal.

The judgment is therefore affirmed.

[illegible] to the traffic and the use of the way or to endanger the life or limb or injure the property of any person or at a speed exceeding 20 miles per hour, and we therefore conclude that he was not entitled to have said misinstructed to the jury further than it was embraced in the instruction which the court gave to the jury of its own motion. Instruction No. 2 sought to define "proximate cause." These words are in fairly common use in English language, and were defined in given instruction as "an immediate or real cause of the injury;" while the refused instruction contained this language: "without intervening [illegible]. [illegible] were less likely to be [illegible] the injury [illegible] proximate cause." One instruction given for defendant is open to just criticism, but we conclude the unnecessary is not sufficient to require a reversal.

The judgment is therefore affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirteenth day of October, in the year of our Lord one thousand nine hundred and fourteen.

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. , Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 13th day of October, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

5945 No/ .

Mamie Thompson, appellee, vs. Chicago, Ottawa & Peoria Railway Company, appellant.	Appeal from Ka Salle.

Opinion by DIBELL, J.

In 1908 the Chicago, Ottawa & Peoria Railway Company operated an interurban railway by electric power from Seneca in La Salle County to Princton in Bureau County and passed through Marseilles, Ottawa, Utica and other towns west thereof. About four miles west of Ottawa was a place of amusement, called Majestic Park, which was operated in the summer time and was conducted by the railway company and others and in part for the benefit of the railway company. A little ~~west~~ east of the park was a highway crossing called Belrose Crossing. The general course of the railway in that vicinity was east and west. A highway ~~ra~~ ran through that vicinity and its general course was also east and west. Approaching the part from the east the highway was south of the railway . At Belrose Crossing the highway turned sharpley to the north-west and went over the railway a little distance and then turned again westerly. The park was on the south side of the railway a short distance west of Belrose Crossing. About 81 1/2 feet west of Belrose Crossing on the highway a lane turned off into an open space just north of the railway, and there people who came to the park in vehicles hitched their teams or parked their automobiles, and then went south across the railway and across a switch, and then into the amosement park. Walter Snell, a farmer, lived north-east from the park, and

[illegible] Ru\ .

[illegible]e Thompson, appellee,	
va.	Appeal from La Salle.
[illegible]cago, Ottawa & Peoria	
[illegible]lway Company, appellant.	

O p i n i o n b y [illegible] J.

In 1908 the Chicago, Ottawa & Peoria Railway Company [illegible]rated an interurban railway by electric power from [illegible]ness in La Salle County to Irington in Bureau County and [illegible]sed through Marseilles, Ottawa, Utica and other towns [illegible]t thereof. About four miles west of Ottawa was a place [illegible] amusement, called Majestic Park, which was operated in [illegible] summer time and was connected by the railway company [illegible] others and in part for the benefit of the railway [illegible]pany. A little west of the park was a highway [illegible]sing called Melrose Crossing. The general course of [illegible] railway in that vicinity was east and west. A highway ra[illegible]n through that vicinity and its general course was also [illegible]st and west. Approaching the park from the east the [illegible]ghway was south of the railway. At Melrose Crossing [illegible] highway turned sharply to the north-west and went over [illegible] railway a little distance and then turned again westerly. [illegible] park was on the south side of the railway a short [illegible]stance west of Melrose Crossing. About 81 1/2 feet west [illegible] Melrose Crossing on the highway a lane turned off into an [illegible]en space just north of the railway, and there people who [illegible]e to the park in vehicles hitched their teams or parked [illegible]ir automobiles, and then went south across the railway [illegible] across a switch, and then into the amusement park. [illegible]ter Small, a farmer, lived north-east from the park, on

his course of travel to reach the park was to come upon said highway a considerable distance east of Belrose Crossing and then go west to the park, and return by the same route. On the night of September 2, 1908, about 10 o'clock, he started to leave the park. He had a two seated surrey, drawn by a span of horses. On the front seat of the surrey were himself and his wife, and one child seated between them. On the rear seat on the left hand side was his wife's sister Mrs. Mamie Thompson , and in the rest of the seat two Snell children, and on her lap her own child. They drove out of the hitching place north and north-east along the private lane, turned upon the highway, and went southeasterly on to the Belrose Crossing. The view of the interurban right of way east of the crossingwas unobstructed. A person standing upon the crossing could see the light of an approaching car for 900 feet. There was a whistling post 800 feet east of the crossing and a crossing post 600 feet east of the crossing. As the track approached the crossing from the east, it curved slightly to the south, so that the headlight of the car would be more plainly visible upon the highway north of the crossing, as the car approached. When Snell's vehicle was upon the crossing it was struck by a west bound interurban car, coming from Ottawa, and the carriage was thrown to the south. When the accident was over, one child lay deadupon the ground. The rest of the party were taken by interurban car to a hospital at Ottawa and one child died on the way. Another child died afterwards as a result of the accident. Mrs. Thompson was

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seriously injured and it became necessary to amputate her left arm below the elbow. She brought this suit against the railway company to recover damages for said injuries, and filed a declaration. The first count charged that defendant, by its servants, so carelessly and negligently drove and managed the said car that, by and through the negligence of defendantin that behalf, the car struck with great force against said carriage and plaintiff was thereby thrown from the carriage and injured. Thesecond count charged that defendant by its servants so negligently ran said car over said highway at said crossing at a rapid rate of speed that, by said negligence, said defendant ran said car at said crossingwith great violence against the carriage and plaintiff was thrown out and injured thereby. The third count charged that defendant negligently failed to ring a bell or sound a whistle or in any manner to warn plaintiff of the approach of said car to the crossing, and, by said negligence of defendant in failing to ring a bell or sound a whistle or otherwise to warn the plaintiff, the car was driven with great force against the carriage and she was thrown out and injured. The fourth count charged that defendant negligently failed to keep a lookout and to watch for the approach of the carriage in which plaintiff was riding and to sound a warning to plaintiff by ringing a bell or sounding a whistle from said car, by such negligence, defendant ran the car with great force against the carriage and she was thrown out and injured. Defendantpleaded not guilty, and there was a jury trial and a verdict awardingplaintiff $5,000 damages; and motions by defendant for a new trial and in arrest of

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negligence of defendants in that behalf, the car struck with
great force against said carriage and plaintiff was thereby
thrown from the carriage and injured. The second count char-
ged that defendant by its servants so negligently ran said
car over said highway at said crossing at a rapid rate of
speed that, by said negligence, said defendant ran said car
at said crossing with great violence against the carriage and
plaintiff was thrown out and injured thereby. The third
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judgme nt were denied, and plaintiff had judgment on the verdict, and defendant appeals.

The first question is whether the jury were warranted by the evidence in f inding defendant guilty of the negligence charged in the declaration. Plaintiff's evidence showed that the car was equipped with a powerfull headlight, which was burning brightly when it left Ottawa and when it reached this crossing, and that fact is not disputed. There were three cars standing on the switch track at the park, ready to startfor Ottawa, one of which was a trailer. The performance at the park had just closed and these cars were to carry to Ottawa and intermediate stopping places the people who lived in that direction and who had been attending the performance. Brady was motorman and Haight was conductor on the west bound car. There were three passengers in that car, Mr. and Mrs. Marsh and a Mrs. Whhls. The latter was not a witness. Marsh testified that he did not hear any whistle sounded as the car approached Melrose crossing nor any whistle at the time of the crash; that he was not listening for any whistle and was not paying any attention to the whistleand did not know whether it sounded or not. Mrs. Marsh testified that no whistle was sounded before they struck the Snell buggy. About two weeks after the accident Mrs. Marsh was visited at her home in Utica by Hanley, who was in the employ of the attorneys of the railway company. He asked her questions about what hse knew of the accident and wrote down her answers and she signed it and it was put in evidence. She stated that Hanley did not try to deceive her, and he testified that he did not attempt to get her to say anything at all other

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than to tell what she knew about the accident. In that statement she said she did not know whether the car whistled or not, as she was not paying any attention, as she and her husband were busy talking. Mr. and Mrs. Boisso and Mrs. Moore, a sister of Mrs. Boisso, were at the park that night and left for home in a single buggy just ahead of Snell's surry, and went over Belrose Crossing a short distance ahead of the Snell conveyance. Mrs. Boisso testified that she did not hear the car whistle, although she saw it coming; and Mrs. Moore testified that she did not notice that the car whistled. Boisso testified that he did not hear the car whistle and that he did not know whether the car whistled 600 or 800 feet from the crossing. The occupants of the Boisso buggy did not hear the crash of the collison and did not know of the accident that night. Jennings and his wife left the hitching place in an automobile shortly after the Snells surrey left, and they each testified. Mrs. Jennings testified that she did not hear any whistle and that at the time of the collison they had not reached a point where they were looking to see whether a car was coming or not. Snell, the driver of the team attached to the surrey in which plaintiff was riding, testified that he did not hear any whistle although he saw the car coming before he reached the crossing, and that he listened to see whether it whistled and that it did not whistle, and that the car was not making any noise that he knew of. Snell was in a hospital for two days after the accident. Donoghue, the coroner, visited Snell in the hospital and took his statement in writing for the

then to tell what she knew about the accident. In that statement she said she did not know whether the car whistled or not, as she was not paying any attention, as she and her husband were busy talking. Mr. and Mrs. Bolsso and Mrs. Moore, a sister of Mrs. Bolsso, were at the park that night and left for home in a single buggy just ahead of Snell's carry, and went over Belrose Crossing a short distance ahead of the Snell conveyance. Mrs. Bolsso testified that she did not hear the car whistle, although she saw it coming; and Mrs. Moore testified that she did not notice that the car whistled. Bolsso testified that he did not hear the car whistle and that he did not know whether the car whistled 300 or 800 feet from the crossing. The occupants of the Bolsso buggy did not hear the crash of the collision and did not know of the accident that night. Jennings and his wife left the hitching place in an automobile shortly after the Snells surrey left, and they each testified. Mrs. Jennings testified that she did not hear any whistle and that at the time of the collision they had not reached a point where they were looking to see whether a car was coming or not. Snell, the driver of the team attached to the surrey in which plaintiff was riding, testified that he did not hear any whistle although he saw the car coming before he reached the crossing, and that he listened to see whether it whistled and that it did not whistle, and that the car was not making any noise that he knew of. Snell was in a hospital for two days after the accident. Dougins, the coroner, visited Snell in the hospital and took his statement in writing for the

information of the coroner's jury at the inquest, which was afterwards held. The cornor testified that he took down correctly what Snell said. In that statement Snell said, "I did not hear the whistle." Hathaway, who was surgeon for the railway company, was present at the hospital when this statement was taken by the cornner and he testified that Snell signed this statement by his mark and that before he signed it the coroner read it over to him. Mrs. Thompson testified that she was fixing the children on the back seat and did not hear any whistleof any interurban car from the time they left the park until the crash came and did not pay any attention to the crossing, but relied upon the driver. Blackburn was at the time superintendent of transportation for the railway company and was at the parl that night and at the time of the accident was working at a telephone operated by the company on the platform at the park entrance, and was arrangeing for the movement of the extra cars stationed on the sidetrack to move the crowd, and was telephoning with the dispatcher when the accident happened. He testified that the whistle of a car could be heard four miles on a clear night, but that he paid no attention to the question of whistles at that time. Brady, the motorman, testified that the whistling post was 700 feet east of the Belrose Crossing, but afterwards testified that he had never measured the distance, and other witnesses showed beyond question that it was 800 feet from the crossing. He testified that when he came to the whistling post east of Belrose Crossing he blew the regular crossing signal, which was two short and two long blasts; that he started thatsignal at the whistling post

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and finished the signal when about 150 or 200 feet east of the crossing; that he shut off the power at the whistling post and when he saw a vehicle approaching 6 or 8 feet west of the crossing when the car was about 100 feet east of the crossing he applied the emergency brakes and reversed the power and started the wheels upon a backward motion and did everything he could to stop the car, and gave 4 or 5 short, quick blasts of the whistle. He also testified that before that he had whistled at the county house about one mile east of Belrose Crossing and at the white bridge crossing about 3/4 of a mile east of Belrose Crossing, and that this was a clear night and only an ordinary breeze was blowing. Haight, the conductor of the west boundcar, testified that he heard the crossing whistle sounded on his car, two long and two short blasts, at the whistling post for Belrose Crossing and that afterwards before they reached the crossing he heard several short, sharp blasts, which was a danger or emergency whistle. He had been a witness at the coroner's inquest and was shown his evidence beforethe coroner, signed by him, and admitted that that statement did not show that he there testified that he heard the usual crossing whistle given, and he stated that he did not remember whether he testified to that fact before the coroner or not. Fitzpatrick, who was not in the employ of defendant at the time of the trial, was a trainman of thiscompany on the night in question, running an extra between Ottawa and the park, and had charge of a car standing on the switch track and waiting for the people at the show to enter the car. There was another car on the switch ahead of his car, which picked up the first load, and he was waiting for the rest of the crowd. he was

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standing on the platform and they were all waiting for the west bound car to pass. He testified that he heard the west bound car give the crossing signal, two long and two short whistles, and after that he heard 3 or 4 sharp blasts from that car. He was somewhat confused as to the hour, but testified that itwas just before this accident happened. Clear testified that he was the conductor on the most eastern car standing on the switch and was waiting for the west bound car to pass and was ready to go east with a loadedcar; that he heard the west bound car coming; that he heard it give the crossing whistle of teo long and two short blasts; and after that heheard more whistles, given the danger signal, short sharp blasts, and then heard of the accident and went to the crossing; and that he had a distinct recollection of hearing the whistles of all of the cars that passed east and west while he was on that sidewalk with his car for some two hours prior thereto. Smith testified that he was policeman at the park that night; that the accident happened about 10 o'clock; that he was standing on the east end of the platform near the main line; that he heard this west bound car give the regular crossing whistle, 2 long and 2 short, east of Belrose Crossing and after that he heard several short blasts of the whistle; and that just before these last whistles he saw a team of horses step upon the track and afterwards heard the crash.
Benders testified that he was then a book keeper for the railway company, and was at the park that night, and went to the platform to get on the car standing on the switch farthest east, which car was waitingfor the regular west

standing on the platform and they were all waiting for the west bound car to pass. He testified that he heard the west bound car give the crossing signal, two long and two short whistles, and after that he heard 3 or 4 sharp blasts from that car. He was somewhat confused as to the hour, but testified that it was just before this accident happened. Clear testified that he was the conductor on the west eastern car standing on the switch and was waiting for the west bound car to pass and was ready to go east with a loadedcar; that he heard the west bound car coming; that he heard it give the crossing whistle of too long and two short blasts; and after that heheard more whistles, given the danger signal, short sharp blasts, and then heard of the accident and went to the crossing; and that he had a distinct recollection of hearing the whistles of all of the cars that passed east and west while he was on that sidewalk with his car for more two hours prior thereto. Also testified that he was policeman at the park that night; that the accident happened about 10 o'clock; that he was standing on the east end of the platform near the main line; that he heard this west bound car give the regular crossing whistle, 2 long and 2 short, east of Malvern Crossing and after that he heard several short blasts of the whistle; and that just before these last whistles he saw a team of horses over upon the track and afterwards heard the crash.

Andrews testified that he was then a beat keeper for the railway company, and was at the park that night, and went to the platform to get on the car standing on the switch farthest east, which car was waiting for the regular west

bound car to pass; that while standing on the rear platform of that east bound car on the switch, he heard the west bound car give 2 long and 2 short whistles, which was a crossing whistle; that he was in a crowd on the rear platform of the car and did not hear any other whistles; that at the time he heard the crossing whistle he was looking up the track on the north side of his car and saw the headlight when the whistle blew; but he could not say where the crossing whistle was sounded. Allison testified that he was motorman on the car standing farthest east on the switch and was waiting for the west bound car; that the head light on his car was shut off in order not to blind the motorman on the car approaching from the east; that, while standing near the head of his car between the two tracks, he heard the west bound car give the crossing whistle, 2 long and 2 short whistles/ and after that heard that car give 3 or 4 sharp blasts of the whistle and after that learned of the accident; that he saw the approaching car when it gave the crossing whistle, and it was about 800 or 900 feet east of the Belrose Crossing then; and that that was about 2,000 feet from where he stood. Bedard testified that he was superintendent of this railway in 1908 and was at the park the night of the accident; that he was there to see that the crowd was handled right, and was waiting for this west bound car to come; that he heard it whistle for the crossing and afterwards he heard shortblasts and learned soon after that an accident had happened; that he did not know where the west bound car was when it whistled. This is the substance of all the testimony upon the question of whether or not the westbound car did give the regular crossing whistles and did

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give the danger signal. We think it apparent that the clear preponderance of the evidenceis that the usual whistles were blown at the us-ual place, and that, if the jury had rendered a special verdict that the defendant did not blow the whistles and give due warning of the approaching of the car to that crossing, and was guilty ofn negligence contributing to this accidentin failing to blow such whistles, a judgment based on such verdict could not be sustained, but that such a judgment must be reversed because not supported by a preponderance of the evidence.

The next question is whether or not the proof as th the speedof the car as it approached and reached Belrose Crossing could be treated by the jury as negligence on the part of the railway company. March testified that in ~~xxx~~ his best judgment the car was running at a speed of 35 miles per hour as it approached Belrose Crossing, and that it did not slow up as it reached the crossing, and that it first slowed up after he heard the crash when it struck the Snell surrey, and that it was runningat the rate of 35 miles per hour when it reached the Belrose Crossing; that no break was put on the car as it ran down the stretch of track towards Belrose Crossin and that no effort was made to stop the car or to slow down at any time before the crossing was actually reached and the surrey was actually struck. Mrs. Marsh testified that she had ridden in automobiles having speedo-meters and running fast, and in her judgment this car was running about 35 miles per hour, and that there was no change in the speed of the car before it reached Belrose Crossing, and that this wa was the fastest ride she ever had on a trolley car. In the

give the danger signal. We think it apparent that the clear preponderance of the evidence is that the usual whistles were blown at the usual place, and that, if the jury had rendered a special verdict that the defendant did not blow the whistles and give due warning of the approaching of the car to that crossing, and was guilty of negligence contributing in this accident failing to blow such whistles, a judgment based on such verdict could not be sustained, but that such a judgment must be reversed because not supported by a preponderance of the evidence.

The next question is whether or not the proof as to the speed of the car as it approached and reached Belrose Crossing could be treated by the jury as negligence on the part of the railway company. Marsh testified that in his best judgment the car was running at a speed of 55 miles per hour as it approached Belrose Crossing, and that it did not slow up as it reached the crossing, and that it first slowed up after he heard the crash when it struck the small surrey, and that it was running at the rate of 55 miles per hour when it reached the Belrose Crossing; that no brake was put on the car as it ran down the stretch of track towards Belrose Crossing and that no effort was made to stop the car or to slow down at any time before the crossing was actually reached and the surrey was actually struck. Mrs. Marsh testified that she had ridden in automobiles having speedometers and running fast, and in her judgment this car was running about 55 miles per hour, and that there was no change in the speed of the car before it reached Belrose Crossing, and that this was was the fastest ride she ever had on a trolley car. In the

statement she made to Hanley, already referred to, she said that she did not know whether the car was running fast or slow before she felt it slack up, and that she noticed the car jerk several times and slow up just before ~~the~~ she heard the crash. The proof for the defendant show that this point was about four miles distant from Ottawa; that this car leftOttawa at 9.38 P. M. and that it was due at the park about 9.55 P. M. or in 17 minutes, which would be at the average speed of slightly over14 miles per hour. The car made two stops after it left Ottawa, one at Poplar Street in Ottawa, where Marsh and his wife entered the car, and the other at the sub-station. Brady, the motorman, testified that from the white bridge crossing to the Belrose Crossing he was running the car part of the time at a speed of 15 to 18 miles per hour, and considerably less the closer the car got to the crossing; that he shut off the power about 1,000 feet from the crossing, put on the air brake about 100 feet fr~~m~~ from the crossing when he first saw the Snell surrey, and reversed the power about 90 feet from the crossing. Haight, the conductor, testified that when the crossing whistle was sounded at the whistling post, about 800 feet east of the Belrose Crossing, the car in his jusgment was running 8 or 10 miles per hour, and after that there were several short, sharp whistles and several jolts which indicated that the car was being brought to a sudden stop, but he was inside the car and could not then see the ~~occasi-~~ ion. The proof was clear that when the car was stopped the rear end was directly between the west cattle guards. The car was a little over 40 feet long and there is proof

statement she made to Hanley, already referred to, she said that she did not know whether the car was running fast or slow before she felt it slack up, and that she noticed the car jerk several times and slow up just before ~~hmm~~ she heard the crash. The proof for the defendant show that this point was about four miles distant from Ottawa; that this car [illegible] at 8.10 p. m. [illegible] that it was at the place about 8.25 p. m. [illegible] 17 minutes, which would be at the average speed of slightly over14 miles per hour. The car made two stops after it left Ottawa, one at Poplar Street in Ottawa, where Marsh and his wife entered the car, and the other at the sub-station. Hardy, the motorman, testified that from the white bridge crossing to the Bellows Crossing he was running the car from 12 to 14 miles per hour, and considerably less as he drew nearer to 14 miles per hour, and considerably less as he closer the car got to the crossing; that he shut off the power about 1,000 feet from the crossing, put on the air brake about 100 feet from the crossing when he first saw the Small survey, and reversed the power about 30 feet from the crossing.

Haight, the conductor, testified that when the crossing whistle was sounded at the whistling post, about 300 feet east of the Bellows Crossing, the car in his judgment was running 8 or 10 miles per hour, and after that there were several short, sharp whistles and several jolts which indicated that the car was being brought to a sudden stop, but he was inside the car [illegible] not know just where the accident. The proof was clear that when the car was stopped the rear end was directly between the west cattle guards. The car was a little over 40 feet long and there is proof

that the cattle guard was approximately 40 feet west of the crossion. If this means from the west side of the crossing, 33 feet should be added to reach the center of the crossing. for there is proof that the highway was 66 feet wide. The car therefore stopped in twice or three times its own length. It weighed about 15 tons. It cannot readily be believed that a car of that weight, running at 35 miles per hour on steel rails, could be stopped in that distance without the destruction of the car. It is not reasonable to believe that the motorman would run the car at any such speed when his regular time only required him to make about 14 miles per hour. It is to be noted also that Marsh and his wife gave this as the speed during nearly all the time they were on the car travelling that four miles . It is not reasonable to believe that the motorman would run his car at such a speed a short distance from the park, when he knew there would be a large number of people and where he evidently intended to stop for west bound passengers, the extra cars on the switch being all for east bound patrons of the show. There is nothing disclosed to us in this record which would prohibit the company from running its cars on its own right of way, as this road was located, at any speed it desired consistent with the safety of its passengers and of its cars. The demandsand necessities of the traveling public are such that the operations of railway trains are not required to bring their cars to a stop or to a low speed as they approach each highway crossing, so that those driving on the highway and seeing the train approach may pass over ahead of the train. On the contrary, the men in control of the car or train, with a proper headlight in the night time and after having given the customary signal, had a right to

that the cattle guard was approximately 40 feet west of the [illegible]. If this means from the west side of the crossing, 33 feet should be added to reach the center of the crossing, for there is proof that the highway was 66 feet wide.

The car therefore stopped in twice or three times its own length. It weighed about 15 tons. It cannot reasonably be believed that a car of that weight, running at 35 miles per hour on steel rails, could be stopped in that distance without the destruction of the car. It is not reasonable to believe that the motorman would run the car at any such speed when his regular time only required him to make about 14 miles per hour. It is to be noted also that Mamon and his wife gave this as the speed during nearly all the time they were on the car travelling that four miles. It is not reasonable to believe that the motorman would run his car at such a speed a short distance from the park, when he knew there would be a large number of people and where he evidently intended to stop for west bound passengers, the extra cars on the switch being all for east bound patrons of the show. There is nothing disclosed to us in this record which would prohibit the company from running its cars on its own right of way, as this road was located, at any speed it desired consistent with the safety of its passengers and of its [illegible]. The immediate [illegible] are such that the operations of railway trains are not required to bring their cars to a stop or to a low speed as they approach each highway crossing, so that those driving on the highway and seeing the train approach may pass over ahead of the train. On the contrary, the men in control of the car or train, with a proper headlight in the night time and after having given the customary signal, had a right to

assume that a team approaching a crossing upon a highway will stop before it reaches the crossing and wait for the car or train to go by. If there is anything in the organization of the defendant company requiring the application of any different rule, it is not charged in the declaration nor established by any proof contained in the abstract.
If the jury had returned a special verdict that the railway company wasguilty of negligence in the speed with which it approached this crossing we would be compelled to say that it was not supported by the preponderance of the evidence.

The only other respect in which it was sought to prove that those operating this car were negligent in the manner of approaching the crossing was that plaintiff sought to show that the motorman and the conductor did not give their undivided attention to looking out ahead as the car approached Belrose Crossing. Much of this evidence was very remote from the place of the injury. The conductor was not required to keep a lookout ahead and it was immaterial whether he was in the frontvestibule or in the middle of the car. The testimony given by Marsh and his wife was that they stood on the west side of Poplar Street crossing in Ottawa, waiting to take the car, that the car stopped on the eastside of the crossing; that they were obliged to cross the street in considerable dust and debris to reach the car; that March was provoked and made remarks about it to the conductor which reached the motorman; that at the next stop the motorman came back outside the car and talked to Marsh, either through the window or outside the car; that then the

[illegible] that a train approaching a crossing upon a highway will stop before it reaches the crossing and wait for the car or train to go by. If there is anything in the organization of the defendant company requiring the application of any different rule, it is not charged in the declaration nor established by any proof contained in the abstract.

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car went on ~~the~~ the motorman ran the car over curves and the Seiberlingswitch at such a rate of speed as to frighten the passengers and cause Mrs. Marsh to scream; that the motorman and conductor stood in the frontvestibule and looked back at Marsh and wife and laughed and sneered at them repeatedly. Marsh did not by his evidence carry this conduct down to the Belrose Crossing, but testified distinctly that he did not remember whether the motorman looked back ~~a~~ at him for the last 800 or 900 feetbefore they reached the Belrose Crossing. The testimony of Mrs. March tended to show that the motorman continued to look back till they reached Belrose Crossing. Mrs. Marsh placed the conductor in the front vestibule all the time from the sub-station to Belrose Crossing, yet in her statement to Hadley she said that when the car struck the surrey the conductor was in about the middle of the car. The conductor and the motorman positively denied any such altercation and any such conduct on the part of either of them. They further showed that Marsh and his wife were sitting near the rear of the rear compartment of the car; that in front of that compartment was a partition, the upper part of which was glass, and then a smoking room, and then the front end of that with glass doors, and that as was customary at night, curtains were drawn across the doors to prevent the light from the car shining into the vestibule where the motorman was. Mr. and Mrs. Marsh testified that these curtains were not across the front doors. The conductor and the motorman testified that they were. The only material question on this subject is whether the motorman's attention was distract-

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Seibertlingswitch at such a rate of speed as to frighten the
passengers and cause Mrs. Marsh to scream; that the
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shining into the vestibule where the motorman was.
Mr. and Mrs. Marsh testified that these curtains were not
across the front doors. The conductor and the motorman
testified that they were. The only material question on
this subject is whether the motorman's statement was distract-

ed from looking out in front of the car as he approached Belrose Cross ing, so that, on that account, he failed to perf form his whole duty. Mrs. Marsh is the only one who testified that he did so. The conductor and the motorman deny it. It is improbable that the Marshs would notice anything of this kind through two glass partitions. Mrs. Marsh told Hanley that she was paying no attention to what was going on, as she was talking to her husband as they approached the Belrose Crossing. If the jury had found by a special verdict that the conduct of the motorman was negligent in this respect, and contributed to this injury, and a judgment had been entered on such verdict, we should feel bound to hold that such verdict was not supported by the preponderance of the evidence.

We find nothing else in the evidence supporting plaintiff's allegations that the defendant was negligent in its operation of this car. The accident was a most lamentable one and well calculated to enlist the sympathies of the court and of the jury, but the sympathycannot go to the extent of requiring some one to pay damages therefor who was not responsible for the accident. As we are of the opinion that the preponderance of the evidence does not sustain any of the charges made against the defendant, it is unnecessary for us to inquire whether the evidence would justify the conclusion that the plaintiff was in the exercise of due care for her own safety, nor does it require us to discuss how far her rights are affected by the conduct of Snell, who saw the headlight approaching and thereafter drove upon the crossing. Some questions concerning the rulings of the court upon the admission of testimony have been discussed, but as such

from looking out in front of his car to be approaching
rose Crossing, so that account, he failed to pay
r diligent duty. Yet, about 15 seconds after
ified that he did so. The examiner and the motorman
y it. It is improbable that the Marths would notice
ance of this kind [illegible].

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rossed the Melrose Crossing. If the jury had found by a
ecial verdict that the conduct of the motorman was negli-
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gment had been entered on such verdict, we should feel
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s are affected by the conduct of Small, who saw the
light approaching and therefore drove upon the crossing.
e questions concerning the rulings of the court upon the
mission of testimony have been discussed, but no such

matters are not likely to be presented in the same aspect in another trial, we deem it unnecessary to discuss them. We hold that the charge of negligence against the defendant are not supported by the preponderance of the evidence, but that there appears to be a preponderance of the evidence against them.

The judgment is therefore reversed and the cause remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this thirteenth day of October, in the year of our Lord one thousand nine hundred and fourteen.

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. , Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 27th day of October, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 5937.

Louis Giachas, appellee, vs. The Cable Company, Appellant.	Appeal from Lane.

Opinion by CARNES, P. J.

Louis Giachas, the appellee, a Russion, unmarried, twenty-three years old, who had been in this country about three years and had been in the employ of The Cable Company, the appellant, in the same grade of employment for one year, earning wages amounting to $509.95; on January 23, 1913 sustained on injury arising out of and in the course of his said employment, whereby he was unable to do any work until July 25, 1913; and as a direct result of said injury his right arm was amputated two-thirds of the way from the elbow to the wrist.

He was entitled to compenastion under the Workman's Compensation Act of June 10, 1911, in force May 1, 1912, since repealed). Jones and Addington's Annotated Statutes Vil. 3, Paragraph 5449. The parties, by appropriate proceedings under that act, submitted the matter to arbitration; and on Aug. 5, 1913 a unanimous report was filed fixing appellee's compensation for said injury at $2,000.00, and that in addition appellant should pay a fee of $225.00 to the physician employed by appellee, and the costs of the hearing. The Company appealed to

No. 6327.

Louis Giachino, Appellee, vs. The Cable Company, Appellant.	Appeal from Lake.

Opinion by GARNER, P. J.

Louis Giachino, the appellee, a Russian, unmarried, twenty-three years old, who had been in this country about three years and had been in the employ of The Cable Company, the appellant, in the same grade of employment for one year, earning wages amounting to $800.00; on January 22, 1912 sustained an injury resulting out of and in the course of his said employment, whereby he was unable to do any work until July 17, 1912; and as a direct result of said injury his right arm was amputated two-thirds of the way from the elbow to the wrist.

He was entitled to compensation under the Workmen's Compensation Act of June 30, 1911, in force July 1, 1912, since repealed). Hence the Arbitrator's Interim Statutes Vil. 3, Paragraph 8422. The parties, by appropriate proceedings under that act, submitted the matter to arbitration; and on Aug. 8, 1912 a unanimous report was filed finding Appellee's compensation for said injury at $3,300.00, and that in addition appellant should pay a fee of $325.00 to the physician employed by appellee, and the costs of the hearing. The Company appealed to

the Circuit Court where a jury was waived and the case submitted to and tried by the Court on a stipulation of facts and some oral evidence introduced by each party, resulting in a finding and judgment against the Company for $1749.90. Appellant brings the record here for review.

It appears from the Bill of Exceptions that the company excepted to the finding and excepted to the judgment, but did not move the Court to set aside the finding or assessment of damages or for a new trial. The principal argument here is that the amount found by the Court is excessive. It is strongly urged by appellee that the question cannot be raised on the record so made and Wamack v. The People 187 Ill. 116 and authorities there cited and discussed are relied on in support of that contention. We have concluded, without deciding that question, to examine the case on the merits.

The parts of the Compensation Act involved and discussed are clauses (b), (c) and (d) of Section 5 which reads as follows: (b) "If the period of disability lasts for more than six working days, and such fact is determined by the physician or physicians, as provided in Section 9, compensation equal to one-half of the earnings, but not less than $5.00 nor more than $12.00 per week, beginning on the eight day of disability, and as long as the disability lasts, or until the amount of compensation paid equals the amount payable as a death benefit."

(c) "If any employe, by reason of any accident arising out of and in the course of his employment, receive any serious and permanent disfigurment to the hands or face, but which injury does not actually incapacitate the employe

the Circuit Court where a jury was waived and the case submitted to and tried by the Court on a stipulation of facts and some oral evidence introduced by each party, resulting in a finding and judgment against the Company for $1,250.00. Appellant assigns the several laws for review.

It appears from the Bill of Exceptions that the company excepted to the finding and excepted to the judgment, but did not move the Court to set aside the finding or assessment of damages or for a new trial. The principal argument here is that the amount found by the Court is excessive. It is strongly urged by appellee that the question cannot be raised on the record so made and Wamsck v. The People 187 Ill. 116 and authorities there cited and discussed are relied on in support of that contention. We have concluded, without deciding that question, to examine the case on the merits.

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(c) "If any employe, by reason of any accident arising out of and in the course of his employment, receives any serious and permanent disfigurement to the hands or face, but which injury does not actually incapacitate the employe

from pursuing his usual or customary employment so that it is possible to measure compensation in accordance with the scale of compensation and the methods of computing the same herein provided, such employe shall have the right to resort to the arbitration provisions of this Act for the purpose of determining a reasonable amount of compensation to be paid to such employe, but not to exceed one-quarter ($\frac{1}{4}$) the amount of his compensation in case of death."

(B) "If after the injury has been received it shall appear upon medical examination as provided for in Section 9, that the employe has been partially, though permanently incapacitated from pursuing his usual and customary line of employment, he shall receive compensation equal to one-half of the difference between the average amount which he earned before the accident, and the average amount which he is earning, or is able to earn in some suitable employment or business after the accident, if such employment is secured."

We held in Stevenson v. Illinois Watch Case Company 186 Ill. App. 418 ; and Waters v. Kroelher Manufacturing Company (Gen. No. 5870), not reported, that there might be a recovery under Clause C. in such a case as this; but the Court in the present case, at the instance of appellant, held there could be no recovery under that clause, but that appellee must recover if at all under clauses b and d. Therefore appellant cannot, and does not, question that basis of cimputing damages. It is agreed that the company had paid a large part of its obligation imposed by clause b, leaving however unpaid, on weekly compensation there provided, according to appellant's computation $7.90 and

n pursuing his usual or customary employment so that it
possible to measure compensation in accordance with the
le of compensation and the methods of computing the same
rein provided, such employee shall have the right to present
the arbitration provisions of this Act for the purpose
determining a reasonable amount of compensation to be
id to such employee, but not to exceed one-quarter (¼)
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(B) "If after the injury has been received it shall
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that the employee had been partially, though permanently,
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employment, he shall receive compensation equal to
-half of the difference between the average amount which
earned before the accident, and the average amount which
is earning, or is able to earn in some suitable employ-
nt or business after the accident, if such employment is
ailable."

We hold in Stevenson v. Illinois Power Co., supra,
Ill. App. (2d) , (Gen. No. 58,[illegible]), that the court, if it chose, might
recovery under Clause C. In such a case we think the
nt in the present case, in the instance of a [illegible],
it there could be no recovery under Clause C, but that
plies must recover if it will [illegible] Clause B.
[illegible]

ia of situating danger. It is [illegible]
pany had paid a large part of its obligation [illegible]
ase b, leaving however unpaid, on [illegible] compensation there
ailed, according to plaintiff's computation ($7,[illegible] and

on appellee's computation $14.54, and also leaving unpaid the physician's bill of $225.00 before mentioned, which appellant stipulated on the trial is a reasonable charge, but as it was shown the company had also employed doctors in the matter, and had paid charges at the hospital and for medicines and dressings, it is claimed that no liability can be based on that charge.

It appears without contradiction that appellee after July 25, 1913 was able to do such work as a naturally right-handed man could do with his left hand; that his injury resulted in blood poisoning making two amputations necessary and causing much sickness and pain, but that his general health was at the time of the trial good; that there was still some soreness but that he would have a servicable stump in from three to six months from the date of the hearing; that he was still unemployed but had been offered employment by the company at wages slightly below his average earnings for the year preceding the injury; but not permanent employment or for any definite period.

The time on which to compute the recovery under clause (d) is practically seven and one-half years; the rate is $709.95 a year; the amount he would earn on that basis is $3824,53; half that amount is $1912.26. The finding of the Court, $1749.90, is reached by deducting from this sum of $1912.25 what in the opinion of the Court appellee "is able to earn in some suitable employment or business after the accident in that period of seven and a half years, and adding to the amount so obtained the sum due under clause (b) and whatever appellant might be found liable for on the

on appellee's computation $14.54, and also leaving unpaid the physician's bill of $225.00 before mentioned, which appellant stipulated on the trial is a reasonable charge, but as it was shown the company had also employed doctors in the matter, and had paid charges at the hospital and for medicines and treatings, it is claimed that no liability can be based on that charge.

It appears without contradiction that appellee after July 26, 1916 was able to do such work as a naturally right-handed man could do with his left hand; that his injury resulted in blood poisoning making two amputations necessary and causing much sickness and pain, but that his general health was at the time of the trial good; that there was still some soreness but that he would have a serviceable stump in from three to six months from the date of the hearing; that he was still unemployed but had been offered employment by the company at wages slightly below his average earnings for the year preceding the injury; but not permanent employment or for any definite period.

The time on which to compute the recovery under clause (d) is practically seven and one-half years; the rate is $705.95 a year; the amount he would earn on that basis is $5824.55; half that amount is $1212.55. The finding of the Court, $1749.30, is reached by deducting from this sum of $1212.55 what in the opinion of the Court appellee "is able to earn in some suitable employment or business after the accident in that period of seven and a half years, and adding to the amount so obtained the sum due under clause (b) and whatever appellant might be found liable for on the

doctor's bill of $225.00.

The problem leads into a field of conjecture and speculation and does not furnish data from which competent men would be likely to reach the same, or nearly the same, conclusion. One claimant might be driven by such an injury from manual labor to other and much more profitable fields of employment; another might become a public charge. It depends on the kind of man under consideration. It is peculiarly a case where the judgment of the trial court, who had the man before him, should not be interfered with by an appellate court unless it clearly appears that the judgment is wrong. While the offer of employment by the company may have been in good faith, we do not think such an offer pending litigation entitled to much weight on the question of probable future earnings. We are not inclined to reverse the judgment on the question of the amount of the finding.

There was evidence heard over the objection of appellant as to pain and suffering of the petitioner, and some other matters of detail that probably should, and would, have been excluded had it been a jury trial. The Court refused to hear testimony of one-armed men produced by appellant as to how they had prospered despite the disability, and heard testimony introduced by appellee, over appellant's objection, to the effect that the loss of an arm is a serious disadvantage in the business world, in obtaining employment and doing work. There was no error in excluding the first, and if error in admitting the second, and we do not say there was, it was of no conse-

doctor's bill of $225.00.

The problem leads into a field of conjecture and speculation and does not furnish data from which competent men would be likely to reach the same, or nearly the same, conclusion. One claimant might be driven by such an injury to seek manual labor to eight and much more profitable fields of employment; another might become a public charge. It depends on the kind of man under consideration. It is peculiarly a case where the judgment of the trial court, who had the man before him, should not be interfered with by an appellate court unless it clearly appears that the judgment is wrong. While the offer of employment by the company may have been in good faith, we do not think such an offer pending litigation entitled to much weight on the question of probable future earnings. We are not inclined to reverse the judgment on the question of the amount of the finding.

There was evidence heard over the objection of appellant as to pain and suffering of the petitioner, and some other matters of detail that probably should, and could, have been excluded had it been a jury trial. The Court refused to hear testimony of one-armed men introduced by appellant as to how they had prospered despite the disability, and heard testimony introduced by appellee, over appellant's objection, to the effect that the loss of an arm is a serious disadvantage in the business world, in obtaining employment and doing work. Therewas no error in excluding the first, and if error in admitting the second, and we do not say there was, it was of no conse-

quence in influencing a finding by a Court. What a one-armed man may or may not do is a matter likely to be determined largely on a knowledge of human affairs which the Court has in common with all mankind.

Finding no reversible error in the record, the judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. , Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 27th day of October, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 5967.

Clotilde Machelli, Appellee, vs. Silvester Torrelli, Appellant.	Appeal from Bureau.

Opinion by CARNES, P. J.

Silvester Torrelli, the appellant, swapped horses with Joe Machelli, the husband of Clotilde Machelli the appellee. Appellee claiming that the horse so traded by her husband was her property, purchased with her own money, and that her husband was not authorized by her to dispose of it, brought this action of replevin before a justice of the peace to recover its possession, laying its value at $150. The case was tried in the circuit court on appeal, resulting in a verdict for plaintiff (appellee). After overruling motions for a naw trial and in arrest of judgment, the court entered judgment on the verdict from which judgment the defendant prosecutes this appeal.

It is argued that there was no demand for possession before suit brought; and appellee's counsel say the only evidence on that question is the testimony of appellee that she told appellant she was going to the pasture and take the horse, and he answered if she did, it would cost her dear. This conversation amounted to a demand and refusal and disposes of that question.

It is assigned and argued as error that the Court

No. 1987.

Clotilde Meshelli, Appellee,
vs.
Silvester Torrelli,
Appellant.

} Appeal from Salem.

Opinion by GARNER, P. J.

Silvester Torrelli, the appellant, swapped horses with Joe Meshelli, the husband of Clotilde Meshelli the appellee. Appellee claiming that the horse so traded by her husband was her property, unknown with her own money, and that her husband was not authorized by her to dispose of it, brought this action of replevin before a justice of the peace to recover its possession, laying its value at $150. The case was tried in the amount on appeal, resulting in a verdict for plaintiff (appellee). After overruling motions for a new trial and in arrest of judgment, the court entered judgment on the verdict from which judgment the defendant prosecutes this appeal.

It is argued that there was no demand for possession before suit brought; and appellee's counsel say the only evidence on that question is the testimony of appellee that she told appellant she was going to the pasture and take the horse, and he answered if she did, it would cost her dear. This conversation amounts to a demand and refusal and disposes of that question.

It is assigned and argued as error that the Court

refused appellant's motion for a peremptory instruction at the close of the plaintiff's evidence, and again at the close of all the evidence. Appellant waived the first question by introducing his evidence in defense after the court overruled his motion, and we do not find that he tended the written instruction asked at either time. If he did not he cannot raise the question here. We are also unable to see any reason why the Court should have directed a verdict for defendant, gad the motion been properly made. The failure of appellant to properly raise and dispose of this point does not however, as appellee argues, dispose of all questions here as to the weight of the evidence, but leaves for decision the question whether the court erred in overruling the motion for a new trial on the ground that the verdict is not supported by the evidence. In passing on the motion to direct a verdict the Court could not weigh the evidence, but in passing on the motion for a new trial he was required to so so.

It is argued that the testimony of appellee, that she obtained the money from her deceased father's estate with which she purchased the horse, is unreasonable and inconsistent with itself, and therefore should be disregarded, and that she probably obtained the money from h her husband who was a laboring man earning wages. There is some ground for the argument, but the evidence sufficiently supports appellee's claim in that regard to make the verdict of the jury conclusive on that question.

It is argued that appellee knew of the trade and ratified it, at least tacitly, by not acting in the

[illegible]ussed appellant's motion for a peremptory instruction at the close of the plaintiff's evidence, and again at the close of all the evidence. Appellant waived the first question by ~~introducing~~ introducing his evidence in rebuttal after the court overruled his motion, and we do not find that he tendered the written instruction asked at either time. If he did not he cannot raise the question here.

We are also unable to see any reason why the court should have directed a verdict for defendant, had the motion been properly made. The failure of appellant to properly raise and dispose of this point does not however, as appellee argues, dispose of all questions here as to the weight of the evidence, but leaves for decision the question whether the court erred in overruling the motion for a new trial on the ground that the verdict is not supported by the evidence. In passing on the motion to direct a verdict the court could not weigh the evidence, but in passing on the motion for a new trial he was required to do so.

It is argued that the testimony of appellee, that she obtained the money from her deceased father's estate, with which she purchased the horse, is unreasonable and inconsistent with itself, and therefore should be disregarded, and that she probably obtained the money from her husband who was a laboring man earning wages. There is some ground for the argument, but the evidence sufficiently supports appellee's claim in that regard to make the verdict of the jury conclusive on that question.

It is argued that appellee knew of the trade and ratified it, at least tacitly, by not acting in the

matter for about a month. The evidence is conflicting as to when and how she learned of the trade, but we find nothing in the record to warrant the conclusion that she ratified it.

The Court at the instance of appellant instructed the jury: "That the only question involved in the case, is whether or not at the time plaintiff's husband and the defendant traded or exchanged their respective horses, the plaintiff in this case was the owner and was entitled to the possession of the horse in controversy", and that the burden of proof was on her to establish that fact. Having asked and obtained that instruction, appellant can not well complain that the jury ignored or mistook other questions of fact, like those of demand before suit brought or ratification of the trade after it was made.

The court at the instance of appellee instructed the jury as to the rights of the plaintiff if a demand was made for the property by the plaintiff and a refusal by the defendant to deliver before suit brought. Appellant complains of this instruction because he says it submitted the question of demand and refusal without any evidence on which to base it. What we have heretofore said disposes of that question.

We find no error in the record, therefore the judgment is affirmed.

earlier the about a month. The evidence is conflicting as to when and how she learned of this trade, but we find nothing in the record to warrant the conclusion that she ratified it.

The Court at the instance of appellant instructed the jury: "That the only question involved in the case, is whether or not at the time plaintiff's husband and the defendant traded or exchanged their respective horses, the plaintiff in this case was the owner and was entitled to the possession of the horse in controversy", and that the burden of proof was on her to establish that fact. Having asked and obtained that instruction, appellant can not well complain that the jury ignored a distinct issue of questions of fact, like those of demand before suit brought or ratification of the trade after it was made.

The court at the instance of appellee instructed the jury as to the rights of the plaintiff if a demand was made for the property by the plaintiff and a refusal by the defendant to deliver before suit brought. Appellant complains of this instruction because he says it submitted the question of demand and refusal without any evidence on which to base it. What we have heretofore said disposes of that question.

We find no error in the record, therefore the judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. , Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the 27th day of October, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 5913.

The People, etc. for the use of John McAndrews, Plaintiff in error, vs. John C. Bruner, et al., defendants in error.	Error to Iroquois.

O p i n i o n P E R C U R I A M.

In this case John C. Bruner and four others were summoned to answer unto the People of the State of Illinois for the use of John McAndrews in a plea of assumpsit. Service was had upon all of the defendants, except J. W. Conard. An attorney entered the appearance of all the defendants. A declaration was filed in the name of John McAndrews, plaintiff, against the defendants. It contained two counts. The first count alleged that Bruner was the treasurer of Drainage District No. 4 in Iroquois County, and filed an instrument which was accepted by the Drainage Commissioners of said District, by which Bruner obligated himself to account for all moneys that came to his hands as such treasurer, and the other defendants obligated themselves for such moneys; that plaintiff contracted with the Commissioners of said District to excavate certain ditches and the District agreed to pay him certain sums therefor on the monthly estimates of the engineer for the District, and that 10% of the estimate for each month was to be withheld as security for the completion of the work and be paid to plaintiff when the work was completed and accepted; that plaintiff dug the ditches, received estimates and received

No. 1241.

The People, etc. for the use of John McAndrews, Plaintiff in error, va. John C. Bunner, et al., defendants in error.	Error to Iroquois.

O p i n i o n F i l e d C o u r t r e m.

In this case John C. Bunner and four others were summoned to answer unto the People of the State of Illinois for the use of John McAndrews in a plea of assumpsit. Service was had upon all of the defendants, except J. W. Conard. An attorney entered the appearance of all the defendants. A legal notice was filed in the name of John McAndrews, plaintiff, against the defendants. It contained two counts. The first count alleged that Bunner was the treasurer of Sheldons District No. 4 in Iroquois County, and filed an instrument which was accepted by the Sheldons Commissioners of said District, by which Bunner obligated himself to account for all moneys that came to his hands as such treasurer, and the other defendants obligated themselves for such moneys; that plaintiff contracted with the Commissioners of said District to excavate certain ditches and the District agreed to pay him certain sums therefor on the monthly estimates of the engineer for the District, and that 10% of the estimate for each month was to be withheld as security for the completion of the work and be paid to plaintiff when the work was completed and accepted; that plaintiff dug the ditches, received estimates and received

90% thereof from time to time and that Bruner as treasurer withheld 10% of each of said estimates at the time; that the amount so withheld belonging to plaintiff amounted to $1,158.25 and that plaintiff never received that sum from any one; that he completed his contract and the work was accepted by the District and the sum so withheld became immediately due and payable to plaintiff; that said sum came to the hands of Bruner as such treasurer and his duty required him to pay it to plaintiff when the work was completed and accepted, and that, though often requested, he had not paid it. The second count contained like allegations and set out said treasurer's bond in haec verba, showing it to be an instrument under seal and showing it not signed by defendant, Cinard. This count also alleged an assessment made and collected to pay for said excavations and that the money came to the hands of said treasurer and that plaintiff had a lien upon said funds in the possession of said treasurer to the amount of all estimates allowed in his favor; that the treasurer paid out of said funds divers amounts upon other claims and indebtednesses of the District and exhausted the entire funds of the District and left no funds with which plaintiff could be paid. The defendants demurred specially and generally to said declaration and said demurrer was sustained and plaintiff elected to abide by the declaration and defendants had a judgment in bar, ~~and~~ plaintiff appeals.

There were several irregularities in the declaration. The People of the State of Illinois for the use of McAndrews being the plaintiff in the summons, it was irregular to file a declaration in the name of McAndrews alone as plaintiff

thereof from time to time and that Bruner as treasurer
withheld 10% of each of said estimates at the time; that
no account be withheld including to plaintiff amounts to
$,158.25 and that plaintiff never received that sum from
ty one; that he completed his contract and the work was
accepted by the District and the sum so withheld became
immediately due and payable to plaintiff; that said sum
was to the hands of Bruner as such treasurer and his duty
required him to pay it to plaintiff when the work was
completed and accepted, and that, though often requested, he
has not yet paid it. The second count contains like allega-
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to be signed by defendant, Ginard. This count also alleg-
ed an assessment made and collected to pay for said improve-
ment and that the money came to the hands of said treasurer
and that plaintiff had a lien upon said funds in the possess-
ion of said treasurer to the amount of all estimates
allowed in his favor; that the treasurer paid out of said
funds divers amounts upon other claims and indebtedness
of the District and exhausted the entire funds of the
district and left no funds with which plaintiff could be
paid. The defendants demurred specially and generally
to said declaration and said demurrer was sustained and
plaintiff elected to abide by the declaration and defendants
had a judgment in bar and plaintiff appeals.

There were several irregularities in the declaration.
The people of the State of Illinois for the use of McAndrews
sued the plaintiff in the summons, it was irregular to
make a declaration in the name of McAndrews alone as plaintiff;

The proper form of an action upon an official bond under seal is bedt and not assumpsit. The second count contains no allegations which would make Tonard liable on an instrument not executed by him. Without determining whether these irregularities would defect the declaration on demurrer, there is another defect which we regard as fatal to each count of the declaration. The declaration does not allege whether this District is operating under the Farm Drainage Act or the Levee Act. Each of said acts forbids the treasurer of a District organized thereunder to pay out any money except upon the order of a majority of the commissioners and in each case the same section shows that the order is to be in writing. The declaration contains no averment that plaintiff obtained any such order written or otherwise, from the drainage commissioners for the money sued for, nor that he presented any such order to the treasurer for payment. The declaration must be construed most strongly against the pleader and must be construed to mean that he did not have or present any such order. The treasurer therefore was not guilty of a breach of his duty or of his bond in failing to make such payment. The declaration did not state a cause of action upon said official bond.

judgment affirmed.

The proper form of an action upon an official bond under seal is debt and not assumpsit. The second count contains no allegations which would make Conard liable on an instrument not accounted by him. Without determining whether these irregularities would defect the declaration on demurrer, there is another defect which we regard as fatal to each count of the declaration. The declaration does not allege whether this District is operating under the Farm Drainage Act or the Levee Act. Each of said acts forbids the treasurer of a District organized thereunder to pay out any money except upon the order of a majority of the commissioners and in each case the same section shows that the order is to be in writing. The declaration contains no averment that plaintiff obtained any such order written or otherwise, from the drainage commissioners for the money sued for, nor that he presented any such order to the treasurer for payment. The declaration must be construed most strongly against the pleader and must be construed to mean that he did not have or present any such order. The treasurer therefore was not guilty of a breach of his duty or of his bond in failing to make such payment. The declaration did not state a cause of action upon said official bond.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and fourteen, within and for the Second District of the State of Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

J. G. MISCHKE, Sheriff.

Filed Apr. 15, 1914.

Reh'g granted Oct 7/14

BE IT REMEMBERED, that afterwards, to-wit: on the 3d day of December, A. D. 1914, the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

William Leisteko, plaintiff in error, vs. Harry Smith, et al., defendants in error.	Error to county court of Lake County.

DIBELL, J. Under date of March 22, 1909, Leisteko issued a distress warrant against Harry Smith and H. S. Roberts for $300, which the warrant declared was due and owing from them to him as rent for 120 acres of land therein described. The warrant was served by seizing certain chattels and was filed in the county court of Lake County and a summons was issued and served upon each of the defendants and they gave bond which was approved and thereby released the chattels from levy. Smith and Roberts filed a plea of the general issue and a notice of certain set-offs. At a trial in 1911, the court directed a verdict for the defendants, which was rendered, a motion by Leisteko for a new trial was denied, and the defendants had judgment. Leisteko sues out a writ of error from this court to review said judgment.

A former judgment against the landlord was before this court in Leisteko v. Smith, 180 Ill. App. 170. The record then before us showed an original lease from Leisteko to Harry Smith and Arnold Bigelow for five years and that at the end of one year Bigelow sold his interest in the lease to H. S. Roberts and that Leisteko then prepared another lease for the remaining four years to Smith and Roberts, which second lease was signed by Roberts only, but was treated by all the parties in interest as in force. At the subsequent trial, the record of which is now before us, no proof was made concerning the first lease and every effort by any witness to refer thereto was promptly stopped by plaintiff's counsel. He put in evidence only the second lease, signed by Roberts only. He proved that

William Heinlein, plaintiff in error,

vs.

Henry Smith, et al., defendants in error.

Error to county court of Yale County.

DIGEST, 2. Under deed of March 20, 1887, Heinlein loaned a dishonest warrant against Henry Smith and J. J. Hobson to him on rent for 120 acres of land thereon described. The warrant was secured by seizing certain chattels and was filed in the county court of Yale County and a summons was issued and served upon each of the defendants and they gave bond which was approved and thereby released the chattels from levy. Smith and Hobson filed a plea of the general issue and a notice of certain set-offs. At a trial in 1911, the court directed a verdict for the defendants, which was rendered, a motion by Heinlein for a new trial was denied, and the contention had judgment. Heinlein sued out a writ of error from this court to review said judgment.

A former judgment against the Heinlens was broken in court in Heinlein v. Smith, 100 Ill. App. 17. The record then before us showed the original loans from Heinlein to Henry Smith and Amelia Tiegelow for five years and also of the end of one year Tiegelow sold his interest in the loans to J. J. Hobson and that Heinlein then prepared another loan for the remaining four years to Smith and Hobson, which second loans were signed by Hobson only, but was brought by all the parties in interest as in force. At the mandatory trial, the record of which is now before us, no proof was made concerning the first loans and every effort by any witness in behalf of Heinlein was strongly objected by plaintiff's counsel. We put in evidence only the second loans, signed by Hobson only. We proved that

Roberts had been in possession under that lease for two years. He did not prove what two years those were. As the second lease began on March 1, 1908, and the distress warrant was sued out in March 1909, Roberts had not been in possession two years under that lease when this distress warrant was issued. Plaintiff produced no evidence that any rent was unpaid nor how much, except as the same could be inferred from the lease signed by Roberts only. At the close of plaintiff's evidence defendants moved that a verdict be directed for defendants. The court indicated that the motion would be granted, and plaintiff thereupon asked leave to re-open his case in order to prove by Roberts or by the plaintiff that the $500 due March 1, 1909 was still unpaid. Defendants objected and the court refused the application to re-open the case. If the only defect in the proofs for plaintiff was the failure to prove that the rent due March 1, 1909, had not been paid, it would have been an abuse of judicial discretion to refuse to permit plaintiff to re-open his case and have that fact proved. But this was a proceeding against Smith and Roberts, Smith did not sign this lease. No proof was made that Smith was ever in possession under this lease. The only evidence in this record that Smith ever had any thing to do with this land is that plaintiff called Roberts and proved by him his signature to this lease and how long he had been in possession of the premises and then asked this question: "Is Mr. Smith there still," to which the witness answered: "Yes, sir, as far as I know." This question related to the time of the trial in June, 1911, and did not prove that Smith was in possession at or before the time when this distress warrant was issued in March, 1909, nor did it prove that Smith was a tenant during the time when the rent sued for was accruing

Roberts had been in possession under that lease for two years. He did not prove that two years more. At the second lease began on March 1, 1908, and the distress warrant was served out in March 1909, Roberts had not been in possession two years under that lease when this distress warrant was issued. Plaintiff produced no evidence that any rent was unpaid nor how much, except as the same could be inferred from the lease signed by Roberts only. At the close of plaintiff's evidence defendants moved that a verdict be directed for defendants. The court indicated that the motion would be granted, and plaintiff thereupon asked leave to re-open his case in order to prove by Roberts or by the plaintiff that the rent due March 1, 1909 was still unpaid. Defendants objected and the court refused the application to re-open the case. If the only defect in the proofs for plaintiff was the failure to prove that the rent due March 1, 1909, had not been paid, it would have been an abuse of judicial discretion to refuse to permit plaintiff to re-open his case and have that fact proved. The plaintiff was prosecuting against Smith and others, Smith did not sign this lease. No proof was made that Smith was ever in possession under this lease. The only evidence in this record that Smith ever had any thing to do with this land is that plaintiff called Roberts and proved by him his signature to this lease and how long he had been in possession of the premises and then asked this question: "Is Mr. Smith there still," to which the witness answered: "Yes, sir, as far as I know." This question related to the time of the trial in June, 1911, and did not prove that Smith was in possession at or before the time when this distress warrant was issued in March, 1909, nor did it prove that Smith was a tenant during the time when the rent sued for was accruing

nor that he was in any way bound by the terms of the lease, signed only by Roberts. The evidence therefore had no tendency to establish a case against Smith, but only against Roberts. Since the Landlord and Tenant Act of 1873, a distress warrant is a suit at law for rent and is governed by the common law rules of pleading and by our Practice Act, except that the distress warrant stands as a declaration. Bartlett v. Sullivan, 87 Ill. 219. Where there is a suit at law against several alleging a joint liability for a debt and all are served with process, the plaintiff, in order to recover, must prove a case against all the defendants or else he must dismiss as to those whom he cannot prove liable and amend his declaration by striking out so much of the declaration as charges that the dismissed party was liable. If the plaintiff fails to prove a case against any one of the defendants whom he retains, he must fail as to all defendants. Felsenthal v. Durand, 86 Ill. 230; Seymour v. Richardson Fueling Co., 205 Ill. 77; Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61; Hem v. Allen, 179 Ill. App. 223.

Plaintiff argues that the plea of set off by the defendants admits that plaintiff has a cause of action against them and obviates the necessity of proof that both defendants are liable to plaintiff for this debt. That might be true if the only plea in this case was of set off, but defendants also pleaded the general issue. Inconsistent pleas are permitted in this state, (Barker v. Barth, 88 Ill. App. 23; Heard's Civil Pleading, 205;) except that a plea in bar of the entire declaration cannot be filed with a plea of tender. County of Jo Daviess v. Staples, 108 Ill. App. 539; O'Meara v. Cardiff Coal Co., 154 Ill. App. 321. Therefore, the plea of the general issue required proof that both defendants were liable for

nor that he was in any way bound by the terms of the lease, signed only by Roberts. The evidence therefore had no tendency to establish a case against Smith, but only against Roberts. Since the Bedford and Tonnant Act of 1873, a fiat warrant is a suit at law for such and is governed by the common law rules of pleading and by our rules but, except that the fiat warrant stands as a declaration. Hartley v. Sullivan, 37 NB. 212. Where there is a suit against several alleging a joint liability for a debt and all are served with process, the plaintiff, in order to recover, must prove a case against all the defendants or else he must dismiss as to those upon no common liable and amend his declaration by striking out so much of the declaration as charges that the dismissed party was liable. If the plaintiff fails to prove a case against any one of the defendants upon no evidence, he must fail as to all defendants. Chesterfield v. [illegible], [illegible]; Pinderton v. Pinderton, 21 NB. 61; Lam v. Allen, 1 NB. 1.[illegible]. 241.

Plaintiff argues that the plea of not joint in the defendants admits that plaintiff has a cause of action against them and obviates the necessity of proof that the defendants are liable to plaintiff for this debt. That might be true if the only plea in this case was of not joint, but defendants also pleaded the general issue. Inconsistent pleas are permitted in this state, Carter v. Hunt, 2 NB. 1.[illegible]. Hence the Court's ruling, that a motion when a plea in bar of the entire declaration cannot be filled with a plea of tender. Gourdy of to Devines v. Stephen, 108 NB. App. 239; O'Leary v. Dorfill Coal Co., 124 NB. App. 321. Therefore, the plea of the gen-

this debt. Plaintiff, however, argues that defendants did not deny their joint liability by a sworn plea and therefore he could recover without the proof of such joint liability. Undoubtedly it is true that if the proof shows each defendant liable for the debt, it is not necessary for plaintiff to show that that liability is joint, where no plea or affidavit has been filed, as the statute requires, denying joint liability. But it is well settled that, notwithstanding joint liability has not been denied by plea, the evidence must show that each defendant is liable in order to entitle the plaintiff to a judgment against any of them in an action ex contractu. Supreme Lodge, A. O. U. W. v. Suhlke, 129 Ill. 298; Imperial Hotel Co. v. H. B. Claflin Co., 175 Ill. 119; M. W. Powell Co. vs. Finn, 198 Ill. 567, to which might be added numerous appellate court decisions. Plaintiff argues that his evidence shows both Roberts and Smith in possession. We find no evidence in the record that Smith, who did not sign the lease, ever accepted it or became bound by it or ever took possession under it and, as there was no case made against Smith, plaintiff could only entitle himself to a judgment against Roberts by dismissing the suit as to Smith and amending his distress warrant or declaration. He did not do this. After he had closed his case, plaintiff asked leave of court to re-open it, but only for the special purpose of proving that the $500, alleged to have been due March 1, 1909, was still unpaid. As he did not offer to prove that Smith owed anything, the court properly refused to re-open the case and properly directed a verdict. We have no alternative but to affirm the judgment.

Judgment affirmed.

each debt. Plaintiff, however, claims that defendants did not deny their joint liability by a sworn plea and therefore he could recover without the proof of such joint liability. Undoubtedly it is true that if the proof shows each defendant liable for the debt, it is not necessary for plaintiff to show that that liability is joint, where no plea or affidavit has been filed, as the statute requires, denying joint liability. But it is well settled that, notwithstanding joint liability has not been denied by plea, the evidence must show that each defendant is liable in order to entitle the plaintiff to a judgment against any of them in an action on contract. Thomas Lodge, 1. S. D. v. Dunlap, 1 Ore. 114; Portland Gas Co. v. S. F. Gaslight Co., 1 Ore. 118; Powell Co. vs. Pim, 108 Ill. 587, to which might be added numerous appellate court decisions. Plaintiff argues that his evidence shows both Roberts and Smith in possession. We find no evidence in the record that Smith, who did not sign the lease, ever accepted it or became bound by it or ever took possession under it and, as there was no case made against Smith, plaintiff could only entitle himself to a judgment against Roberts by dismissing the suit as to Smith and amending his distress warrant or declaration. He did not do this. After he had closed his case, plaintiff asked leave of court to re-open it, but only for the special purpose of proving that the [illegible], alleged to have been on March 1, 1909, was still unpaid. As he did not offer to prove that Smith owed anything, the court properly refused to re-open the case and properly directed a verdict. We have no disagreement as to affirm the judgment.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

190 A-350

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~~53~~

Oct-7-1914 - R. H. - decided

Gen. No. 6218- April Term, 1914- Ag. No. 37-

E.S. Combs,
Appellee-

Filed July 2nd, 1914-

VS. ; Appeal from Shelby.

James Pulliam,
Appellant.

190 I.A. 350

Thompson, P.J.

This is an action of assumpsit begun by E. S. Combs, to recover from James Pulliam the value of certain farm machinery sold and delivered by plaintiff to Harry Paradee. The declaration contains only the common counts. A jury returned a verdict in favor of plaintiff against the defendant for $391.30 on which judgment was rendered and the defendant appeals.

The evidence shows that the appellant was the owner of a farm near Findlay. Harry Paradee is the son in law of appellant and in the Spring of 1912, moved on a farm of appellant. Appellee is a merchant in Findlay, and president of the First National Bank of Findlay. Appellee testified that about the time Paradee moved to the farm, appellee had a conversation with appellant in which "Mr. Pulliam told me, he said that his son in law was moving to the farm and that he would need some implements and for me to let him have them and he would see that they were paid for, guarantee the payment; I told him all right we would sell him whatever he wanted". Following this conversation appellee furnished Paradee such goods as he wanted to the extent of $381.30. The goods were charged on appellee's books to Paradee, and no charge was made against appellant. In August appellee sent a statement to Paradee and on September 1, 1912, appellee took a judgment note from Paradee for $70. payable to the order of appellant and on September 6, he took a second judgment note from Paradee due December 1, 1912, for $311.35 and interest at 6 per cent to balance the account, which was marked paid. Before the notes matured appellee indorsed the notes to the First National

Bank of Findlay and they were credited to his account. Appellant did not sign either note, and knew nothing about them at the time they were made. After the notes had been transferred to the bank, it on December 24, 1912, took a new judgment note for $388.65- payable to the bank and surrendered the original notes. Neither appellant nor appellee had anything to do with the taking of the new note, and it was not indorsed by appellee. Appellant never made any promise in writing to assume or be responsible for the payment of the account or notes of Paradee. Afterwards the bank had a judgment entered on the last note against Paradee in favor of one Coventry, the cashier of the bank. Officers of the bank testified that the judgment was entered at the request of appellant and that appellant said he would pay it if it could not be collected from Paradee. At the close of the evidence the appellant requested a peremptory instruction to the jury to return a verdict in his favor. This the court refused and it is contended that on the evidence a judgment in favor of appellee cannot be sustained.

The statute of frauds provides that no action shall be brought thereby to charge a defendant upon any special promise to answer for the debt of another unless the promise or some memorandum thereof is in writing, signed by the party to be charged. It is not necessary to plead the statute of frauds in order to get the benefit of the statute, where the declaration consists of the common counts only. Durant vs. Rogers, 71 Ill., 121-

The statement of appellee that the goods were to be sold to Paradee and appellant "would see that they were paid for, guarantee the payment", is simply a promise to answer for the debt of Paradee. McDowell Stocker Co., vs. Sharp, 157 Ill., App 165- The meaning of the word guarantee as defined by Webster is;- "To undertake or engage for the payment of (a debt) or the performance of (a duty) by another person". The promise of appellant was not an original promise but collateral to the promise of Paradee. This is clearly shown by the promise and the acts of the parties. Scheenfield vs. Brown, 78 Ill., 487; Lusk vs. Throop, 189 Ill. 127- Eddy vs. Roberts, 17 Ill., 505.

The goods were sold to Paradee and charged to him. ~~Thix~~ His note was taken in payment of the account by appellant and transferred to the bank; after the original notes had matured the bank took the note of Paradee payable to itself without any indorsement by appellee and thereafter had a judgment entered against Paradee. Appellee has received his money on the note of Paradee, and is not now liable to the bank because of the bank having taken a new note from the original debtor. The court erred in refusing the instruction. There can be no recovery against the appellant under the evidence and the judgment is reversed with a finding of fact to be incorporated in the judgment, that the promise of appellant was to answer for the debt of another and not being in writing is void by the statute of frauds.

R E V E R S E D.

Spill Tower

#48- 1914-

A-Non-Rmc. J.

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Oct - 7-1914 - R-H - Denied

Oct -

Gen. No. 6077. ~~April~~ Term, 1913- Agenda No. 64-

Filed July 2, 1914-

190 I.A. 351

The Starr Piano Company.,
Appellant-

vs. ; Appeal from County Court Piatt County.

G.W.Lawrence.,
Appellee-

ELDREDGE, J.

On the 25th day of January, 1913, the Coroner of Piatt County, by virtue of certain executions issued out of the Circuit Court of said county, levied upon seven pianos in the possession of the firm of Combes & Frisinger. The executions were issued on three judgmentss rendered in favor of appellee. The first was against Combes, the second against Frisinger and Agnes Frisinger and the third was against Frisinger. Afterwards in the County Court there was a trial of ~~xxxx~~ right of property, in which appellant was claimant and appellee was defendant. The cause was submitted to the court for trial without a jury and on February 4th- 1913, the court entered judgment finding the right of property in appellee, and an appeal was prayed for by appellant and allowed to the Appellate Court. Twenty-five days thereafter appellant moved the Court to set aside the judgment and for leave to submit certain propositions of law and fact and requested the Court to rule upon said propositions of law and fact and mark

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351 (19) (54)

Oct - 7-1914 - R-14- Denied

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Gen. No. 6077. ~~April~~ Term, 1913- Agenda No. 64-

Filed July 2, 1914-

190 I.A. 351

The Starr Piano Company.,
Appellant-

VS. ; Appeal from County Court Piatt County.

G.W.Lawrence.,
Appellee-

ELDREDGE, J.

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Thereupon appellant made a motion to set aside the judgment and findings of the Court and for a new trial, which was overruled.

Thereupon appellant moved to set aside the order for appeal and judgment and for a new trial, which was overruled.

The actions of the Court in overruling these various motions was ~~xxxxxxx~~ perfectly proper. The time to present propo-

sitions of law and fact to the Court on a hearing before the Court without a jury is after the evidence and arguments are concluded and before the Court has made its decision. In this instance the Court had made its findings, entered judgment thereon and an appeal had been prayed and allowed, and twenty-five days had elapsed before appellant presented its propositions of law and fact. Counsel cannot speculate on the decision of the Court and when it is adverse ask the Court to pass upon numerous propositions of law and fact. The Court would have had no jurisdiction to entertain the motion until the order for appeal had been vacated. There was no motion to vacate the order for appeal made by appellant, when it asked leave to present the propositions of law and fact.

The next motion to set aside the judgment and finding and for a new trial, could not have been entertained by the court for the same reason.

The last motion embraced the setting aside the order for appeal, the judgment and findings and the granting of a new trial collectively and the Court could not have granted the said motion without granting all three requests. If a motion had been made by appellant to set aside the order of appeal, it might have properly been allowed by the court, but the allowance of that motion would not have necessarily meant that the judgment rendered on the finding should have been vacated, and if the judgment had been vacated it would not necessarily have meant that the finding of the Court should have been set aside and a new trial granted. The only assignment of error on the rulings of the Court as to said various motions above mentioned are to its refusal to pass upon the propositions of law and fact, in which there was no error.

No exceptions were taken to the admission of any evidence and the only questions involved are those of law as to the construction of certain written contracts, and as no propositions of

law were asked, there is nothing for this court to determine in regard thereto.

The judgment is affirmed.

A F F I R M E D.

Oct. Term.
1913 -

L. Pillsbury Jr.

A 353 (80) (55)

Oct. 7 - 1914 - F. H. Dissented -

Gen. No. 6130. Oct. Term, 1913- Ag. No. 34-

Filed July 2, 1914-

Grace H. Leaverton,
Appellant.,
vs. ; Appeal from Circuit Court of
John A. Myers., Sangamon County.
Appellee-

190 I.A. 353

MIDDLEKYE, J.

This is an action in assumpsit brought by appellant against appellee to recover for four months rent under a lease. The Jury found the issues for appellee and judgment was entered in his favor.

Appellant rented to appellee a flat known as Number 722 So Fourth Street in the City of Springfield, by a written lease, from September 1st 1911, to October 1st, 1912, at a rental of $50. per month, payable on the first day of each month. Appellee occupied the premises until the last day of December, 1911, and paid the rent due up to that time. He then vacated the premises and this suit was brought for the rent due on the first days of January, February, March and April, 1912, aggregating $200. Appellee filed a plea alleging that after the execution of the lease and on the 1st day of January, 1912, he surrendered the premises to appellant and appellant accepted the same.

Appellee was occupying the flat under a renewal of the original lease. The evidence of appellee tends to show that his wife was in poor health and recovering from an operation and that the noise of the tenants in the flat above made it very annoying and uncomfortable for her and retarded her recovery; that complaint of this noise was made to appellant, who promised to have it

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Oct-7-1914- R. H. Sherrod-

Gen. No. 6130. Oct. Term, 1913- Ag. No. 34-

Filed July 2, 1914-

Grace H. Leaverton,
Appellant.,
vs. ; Appeal from Circuit Court of
John A. Myers., Sangamon County.
Appellee-

190 I.A. 353

MIRMIRE, J.

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Appellee was occupying the flat under a renewal of the original lease. The evidence of appellee tends to show that his wife was in poor health and recovering from an operation and that the noise of the tenants in the flat above made it very annoying and uncomfortable for her and retarded her recovery; that complaint of this noise was made to appellant, who promised to have it discontinued, but did nothing in regard to the matter. The final result was that appellee made an agreement with appellant to take

and appellee moved out of the premises in question. The evidence discloses that the husband of appellant acted as her agent throughout all the negotiations and that appellee's mother-in-law acted as his agent in most of the negotiations. The evidence is very conflicting as to just what was said and done between the parties and between their respective agents in regard to the surrender of the premises and the making of the new lease for the other flat. These were all questions for the jury to determine and the jury having found its verdict for appellee and as it is not manifestly against the weight of the evidence, it will not be disturbed on that ground.

Criticism is made of the refusal to give two instructions for appellant and to the giving of two for appellee, but the instructions as a whole fairly cover every phase of the case and the jury could not have been misled as to the law.

The judgment is affirmed.

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J. A. Creighton

A-3c3 (82) (54)

Gen. No. 6150 October Term, 1914, 3 R. H.224

Filed Oct . 16, 1914-

A. H. Miller and A. E. Foster,)
Appellees,)
vs.)
Joseph A. Miller,)
Appellant,)

Nov. 6, 1914- R.H.Denied-

Appeal from Douglas.

190 I.A. 363

Opinion by Thompson, P. J.

Plaintiffs began this suit in assumpsit on February 10, 1910, in the circuit court of Moultrie county to recover $480.00 claimed to be due from the defendant on account of services performed by them in finding a purchaser for an eighty acre tract of land of the defendant.

This case was tried three times in Moultrie county and new trials granted, after which the case was transferred to Douglas county by a change of venue. On a trial there at the close of the plaintiff's evidence, the defendant not offering any evidence, the court instructed a verdict for plaintiff for $94.30. Both parties made a motion for a new trial. The court overruled the motion of both parties and rendered judgment on the verdict for plaintiffs. The defendant appeals and the plaintiffs have assigned cross-errors.

On May 5, 1914, during the April term of this court an opinion was filed reversing and remanding this case on an assignment of a cross-error. The appellant gave notice to appellees of an application for a rehearing and June 5, filed his petition for a rehearing which the court granted during the term at which the opinion was filed. Afterwards the appellees brought it to the attention of the court that the petition for rehearing was not filed within the time prescribed by the rule of court and therefore it should not have been allowed on the motion of appellant. Appellees have not entered any motion to strike the petition for a rehearing from the

The appellees are real estate agents in Sullivan, Moultrie county, and the appellant is a farmer who owned an eighty acre farm a few miles east of Sullivan. The evidence for the appellant is that in the spring of 1909, A. H. Miller had a conversation with appellant relating to the sale of the eighty acre tract; that appellant said to A. H. Miller that if his firm would sell the eighty acre tract for him at $150.00 per acre he would pay the firm one dollar per acre and in addition thereto would give them all they could get for the eighty acres above the price of $150;00 per acre. A. H. Miller took Robert S. Haley, a farmer, to see the land and after inspecting it, Miller and Haley drove to the house of appellant where the terms of sale were discussed between the two Millers and the agreement about the commission to be received by appellees was repeated. After some discussion between appellant and Haley an agreement was reached by which appellant was to sell the eighty acres to Haley for $155.00 per acre and the terms of payment agreed upon. A few days thereafter, on July 17, 1909, the parties met in a law office and a written contract was executed for the sale of the land under which appellant was to retain possession of it until March 1, 1910, and Haley was to pay $12,400.00 for it, payable $400.00 by a note due in thirty days, $2,000.00 March 1st, 1910, Haley to assume the payment of a $4,000.00 mortgage on the farm and to give twelve notes, each for $500.00, payable one on March 1st, 1911, and one each year thereafter, all bearing interest from March 1st, 1910. The last clause of the contract is as follows:

"It is further agreed by and between the parties hereto that if the party of the first part shall fail or refuse to perform any of the covenants or conditions of this contract on his part to be performed, he shall pay back to the party of the second part the four hundred dollars which the party of the second part has paid on the purchase price of said land, and shall pay the further sum of four hundred dollars as liquidated

damages for his failure to perform his part of this contract, and in case party of the second part shall fail to perform any of the covenants and conditions of this contract on his part, to be performed, he shall pay to the party of the first part the sum of four hundred dollars as liquidated damages for a failure to performhis part of this contract, to be paid by his losing the $400.00, he had paid on said land." At the time the contract was executed appellant and his wife executed a deed of the land to Haley, which was placed in escrow in a bank to be delivered when the notes and mortgage should be executed and delivered and the cash payment made.

The record does not show that anything further was done except that the appellant received the first payment of $400.00 and that Haley forfeited the same and the contract was abandoned by both the parties to it.

The instructed verdict for appellee is for a commission of $1. 00 per acre and interest thereon. Appellant assigns as error that the judgment cannot be sustained on the evidence.

The parties have argued the question of whether the contract executed by appellant and Haley was an optional contract or a contract the execution of which could be enforced by the parties. There is no dispute so far as the agency contract is shown by the record that appellant said "if he would get $150.00 per acre he would give us one dollar per acre and all above that we got", and the evidence is that Haley agreed to pay $155.00 per acre a few days before the written contract was executed, and by the written contract he agreed to pay $155.00 per acre, on March 1st, 1910, when possession was to be delivered to him.

Appellant contends that the clause quoted in the written contract makes it an optional contract and that Haley had the right to abandon it and that all he would lose would

be the $400.00 paid, while appellees contend that the contract was not optional and that appellant could have enforced its performance.

Appellant relies on the case of Lawrence vs.Rhoads, 188 Ill. 96, as authority that the contract executed by the parties to this suit is an option contract. The Lawrence contract has little analogy to the contract in controversy. In the Lawrence case the contract was executed by the agent for his principal, it provided that in case the purchaser shall not on tender of the deeds make payment of the cash balance "then in that case this agreement shall be null and void and the earnest money paid thereon may be retained" "in full of all damages for non performance."

In Koch vs. Streuter, 218 Ill. 546, following Lyman vs. Gedney, 114 Ill. 388, it was held, "The mere fact, that a contract stipulates for the payment of liquidated damages in case of failure to perform does not prevent a court of equity from decreeing specific performance." As was said in the Koch cause the provision for the cash payment of $00.00 was merely a security for the performance of the contract and there is nothing in the terms of the contract to justify the conclusion that either party had the right to perform the contract or in lieu thereof to forfeit the sum of ~~$00x00x~~ $400.00. The contract is not in the alternative, neither is there any provision in it that it shall become null and void on the failure to perform any of its conditions; its performance could have been enforced. Wilson vs. Mason, 158 Ill. 304; Fox vs. Ryan, 240 Ill. 391.

The evidence shows that when one of the appellees first took Haley to appellant, he accepted Haley as a purchaser and made an oral agreement with him by which the sale was to be made on terms mutually satisfactory.

Appellees having produced a purchaser ready, able and willing to buy the land at a price above that fixed by appellant, appellees had earned the compensation of one dollar an acre agreed to be paid by appellant, and would be entitled to the excess above $150 per acre when the sum was paid.

The ad damnum in the declaration and the damages claimed in the praecipe are $480. The record in the case after the case was transferred to Douglas county on February 12, 1913, contains the following "now on this day come the plaintiffs in the above entitled cause by their attorneys, and move the court for leave to amend the ad damnum; which said motion, on due consideration by the court, is allowed." The motion does not show what amendmeny was desired to be made and the record contains no amendment.

At the close of all the evidence the plaintiffs requested the following instruction: "The court instructs the jury to find the issues for plaintiffs and assess the plaintiff's damages at $550.80." The court modified the instruction by erasing the figures $550.80 and inserting in place thereof "Eighty Dollars with interest at 5% from July 27, 1909." The appellants assign error on the refusal to give the instruction as requested. The court did not err in refusing to give the instruction as asked for the technical reason that it was more than the ad damnum; and for the further reason that the contract as testified to on behalf of appellees was: "He said if we could get $150 per acre he would give us One Dollar per acre and all above that we got." An agreement was made for the sale of the land at $155 per acre to be consumated on March 1, 1910. The contract, for some reason not disclosed by the record, was forfeited, and appellant did not receive the $155 per acre. The agents were not entitled to maintain an action as to the $5 per acre until the money was paid, or at least until the contract had matured and a reasonable time had elapsed for its collection.

Evans vs. Hughey, 76 Ill. 115; Burnett vs. Potts, 256 Ill.499. This suit was begun before the money was due on the contract, even if the contract had been afterwards consumated. This question was raised by appellant in their reply brief but by inadvertence was overlooked by the court. All that appellees were entitled to recover, when the suit was begun, was the commission of one dollar per acre and interest thereon. There was no error in the modification of the instruction.

The rehearing should not have been granted on the petition of the appellant because it was not filed in time. It is also clear that the court erred in the opinion filed May 5, in reversing and remanding the case. The court, however, has control over its judgments during the term at which they are entered, and the rehearing granted at the May term will be allowed to stand as granted on the initiative of the court. Blake vs. DeJonghe Hotel Co., 265- Ill. 471). (Stafford vs. C. B. & Q.R.R.Co. 114 Ill. 244). The judgment is affirmed.

Affirmed.

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Schlitzer

J.

A 365

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Gen. No. 6159- October Term, 1913- Ag. No. 73-

Filed Oct. 16, 1914-

Martin Underwood,
Appellee-

VS. ; Appeal from Vermilion.

C.C. Ankrum., and Ida R. Ankrum.,
Appellants.

190 I.A. 365

Thompson, P.J.

This is a suit commenced before a justice of the peace by appellee seeking to recover damages for the alleged wrong ful closing of a public highway by appellants, thereby depriving appellee and his customers of access to a coal mine of appellee, whereby he sustained damages to his coal business. Appellee obtained judgment before the justice and on appeal in the circuit court, a verdict for $50. was returned in his favor , on which judgment was rendered.

On the trial in the circuit court, motions were made at the close of appellee's evidence and at the close of all the evidence, to exclude the evidence and direct a verdict for appellant's these motions were overruled and the instructions refused .

It is assigned for error, that the justice of the peace had no jurisdiction of the subject matter of the suit. The jurisdiction of a justice of the peace is limited to the cases in which jurisdiction is given in Article 11, Section 16, of the Justice's and Constable's Act.

The only remedy for damages the appellee has under the evidence, if it was established by the evidence that appellants wrongfully closed a public highway, is by a suit in case; there is no statute giving a justice of the peace or the circuit court on appeal, jurisdiction in this character of cases; neither real estate nor personal property belonging to appellee was touched or

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molested by appellants, the damages sued for are neither an injury to real estate nor to personal property. Western Union Telegraph Co., vs. DuBoss, 128 Ill., 248; Stuckey vs. Churchman, 2 Ill. App. 284.

The town might have brought a suit before a justice of the peace to recover the ~~xxxxxxx~~ statutory penalty for obstructing a highway; or appellee might have brought suit in the name of the ~~xxxx~~ town, but such a proceeding would be in the nature of a criminal action. Village of Dolton vs. Dolton, 2201 Ill., 155 .

Since an action to recover damages of the nature of those here involved must be in case, this suit was improperly brought before a justice of the peace, because under out statute, justices of the peace have no jurisdiction in actions on the case.

The judgment of the circuit court is reversed.

R E V E R S E D.

Oct. Term
1913

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E. R. E. Kimbrough, J.

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Gen. No. 6184- April Term, 1914- Ag. No. 17

The People of the State of Illinois, Filed Oct. 16, 1914-
Defendant in Error-

vs. ; Error to City Court of Pana.

Robert Johns,
Plaintiff in Error-

190 I.A. 367

Thompson, P .J.

An indictment was returned by a grand jury of the city of Pana charging Robert Johns with having made an assault with a deadly weapon, to wit an iron seal, upon William H. Alexander with intent to inflict bodily injury, no considerable provocation appearing. A second count charged and assault as being made "under circumstances showing an abandoned and malignant heart and no considerable provocation appearing". On a trial a jury returned a verdict of guilty of assault with a deadly weapon with intent to inflict a bodily injury, the circumstances showing an abandoned and malignant heart. The court overruled a motion for a new trial and assessed a fine of $500. against the defendant. The defendant prosecutes this writ of error-

The evidence in this case tends to show that the plaintiff in error and the complaining witness, W.H.Alexander, with other parties had been engaged in an oil enterprise in Oklahoma under the name of the Johns Pierpont Oil and Gas Company, and that the plaintiff in error, who had been president of the company, had been acting for himself and as agent of the others in developing some oil lands and in the purchase of an additional lease; that plaintiff in error's expenses had been paid from time to time, but there had not been a settlement between them. It is also shown that plain iff in error ~~in~~ had obtained a lease in the name of a Dr. Bolt, for which plaintiff in error had paid $1070- with his own check. Bolt had assigned this lease to the company, and delivered it to J.J.Pierpont, the secretary of the company , to hold until plaintfff in error was paid therefor and a settlement made

between plaintiff in error and the company. There was a disagreement between plaintiff in error and the company. A meeting was held by Alexander and the other members of the company at which plaintiffin error was not present. At this meeting some of the parties asked permission of Pierpontto see the lease after which it was passed back to Pierpont. One, Barrett, who is the president of the company, again asked to see the lease; it was handed to him and he passed it to Alexander, the treasurer of the company, and told him that he was treasurer and the proper custodian of it. Pierpont insisted that the lease should be returned to him to hold and said it had been obtained from him by a put up job to obtain it surreptitiously. Barrett said Pierpont's conclusion was correct. Pierpont then telephoned to Johns, who with his attorney came to the meeting and was told what had occurred. Johns said they should not take the lease from Pierpont's office, when Alexander told Johns he was a bluffer. Barrett testified that he got one of the directors to get the lease from Pierpont and purposed getting it by strategy. From this time the evidence is conflicting. Three witnesses testify that Alexander first prepared for action and started towards Johns, saying there was one man who was not afraid of him, and that Johns grabbed a notarial seal and struck Alexander, but there is a conflict in the evidence as to who struck the first blow. Alexander is much the younger and heavier man, and at the end of the fight Johns' clothes were torn off him, his nose bleeding, and skin knocked off his face.

With the admission of Barrett and Alexander that they were intending to and did get this lease by strategy from Pierpont in whose custody it had been placed to hold until certain matters were settled, we think there was such provocation that a fine of $500. is excessive under the circumstances. The complaining witness was a partner in a conspiracy to get possession of the lease whether they were entitled to it or not.

The court in instructing the jury told them what the penalty was for the offence charged . That was a matter with which the jury had nothing to do.

The court also instructed the jury that words however opprobriouscannot be said to constitute the considerable provocation contemplated by the statute. There was proof tending to show the first assault was made by the prosecuting witness. While words themselves are not an excuse for an assault, yet words and acts which in their nature tend generally to excite the angry passions of men are admitted in evidence in extenuation of an offence where the question of want of considerable provocation is an element. (2 R.C.L. 154). Words coupled with acts, which are admitted to have been done in the carrying out of a conspiracy to obtain possession of property from other parties, may be considered in arriving at a conclusion of whether the assault was without considerable provocation, where want of such provocation is a material avermont of the indictment. Ruble v. People 67 Ill. App., 438; People v. Ripston, 173 Ill. App. 558. The jury however, by their verdict acquitted the plaintiff in error of the charge in the first count so that this instruction was harmless.

The twenty-fourth instruction given at the request of the people tells the jury that where personal property is wrongfully with held from the owner against his wishes, such owner can obtain possession thereof by peaceable means or if it comes to his hands , he has a right to hold it against the world. This is an abstract proposition, and is misleading. The jury might infer that Alexander had the right to conspire to get possession of the lease., or that he was entitled to its possession, notwithstanding the conditions under which it was placed with Pierpont .

The court also gave an instruction requested by the people the latter part of which is;- that if the jury believe that the accused has wilfully testified falsely to any fact materialto the

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Gen. No. 6197 April Term, 1914. Ag. 18

Calvin Petty, Appellee,)
vs.) Appeal from Coles.
Hugh Maddox,)
Appellant,)

Filed Oct. 16, 1914-

190 I.A. 381

Opinion by Thompson, P. J.

This is a suit begun before a justice of the peace by Calvin Petty against Hugh Maddox, to recover damages for the killing of a horse belonging to plaintiff which was struck, while running at large on a public highway in the country about midnight, by an automobile driven by the defendant. An appeal was taken from the judgment of the justice to the circuit court, where a jury returned a verdict in favor of plaintiff for $128, on which judgment was rendered and the defendant appeals.

It is contended that the judgment must be reversed because the appellant at the time of the trial was a minor of the age of twenty years and a guardian ad litem was not appointed to appear and defend for him.

While a judgment against a minor, where no guardian ad litem has been appointed is not void, but only voidable, no steps in a case should be taken against a minor until a guardian ad litem has been appointed where a guardian does not appear and defend for him. Peak vs. Shasted, 21 Ill. 137; Hall vs. Davis, 44 Ill. 494; Kesler vs. Penninger, 59 Ill. 134; Maine vs. Cosner, 67 Ill. 566; White vs. Kilmartin, 205 Ill. 525; Thurston v. Tubbs, 250 Ill. 540:

The evidence shows that the horse, a two year old, was on the public highway at large, but it was not there with the consent or knowledge of the owner. The evidence further tends to show that it had escaped from a pasture without the fault of the owner.

The only evidence in the record concerning the manner in which the horse was struck by the automobile is that of the appellant and evidence, concerning tracks of a horse in the road, from which inferences are sought to be drawn. The

appellant, a boy twenty years of age, testified that he was driving a 30 horse-power automobile, with the lights burning brightly, along the public highway from west to east about midnight at a speed of between 15 and 20 miles an hour; that he had slowed down over a bridge about 170 yards west of where the horse was struck and there was another bridge 50 yards in front of him, and that he was watching the road in the direction he was going; that the horse came suddenly from the south side of the road into the beaten track about five feet in front of the machine and he at once disconnected the engine and applied the foot brakes, but the machine struck the horse; that the road was dry and dusty and he did not see any dust or the horse until it suddenly jumped in front of the machine; that the striking of the horse jarred appellant's feet off the clutch and the brake so that the full power was again connected and the machine ran a short distance before appellant stopped it, and that he went to the house of E. Dusan 60 yards distant, awoke the occupants and told them he had struck a horse and inquired if it was theirs. Dusan said he thought it was Petty's and they went to Petty's house 200 yards distant and awoke him. There is evidence that there were horse tracks in the road from the west, that the horse left the road and went to the Dusan gate at the side of the road and then back to the road a few feet east of the gate, where it was struck and was killed about ten yards east of the gate and that there were scrapes in the road from in front of the gate to where it died some ten yards east of the gate. There were nonnoticible bruises on the horse.

The appellee's third instruction informs the jury that the law requires the person operating an automobile to use such a degree of care and caution in driving the automobile as will prevent injury to the person or property of other persons, and property rightfully on the highway. This instruction

makes the driver of an automobile an insurer of the property of others on a highway against accidents. All that appellant was required to do was to use ordinary or reasonable care in the running of the automobile and not to drive it at a speed greater than is reasonable and proper having regard to the traffic and the use of the highway or so as to endanger the life or limb or injure the property of any person. If the rate exceeds 25 miles an hour in the country then such speed is prima facie evidence that it was being operated in a negligent manner. This instruction was erroneous, in requiring a greater degree of care than the law requires. Appellee's seventh instruction is also subject to the same objection.

Appellee's fifth and sixth instructions are very argumentative in their nature; they direct the attention of the jury to particular parts of the evidence and conclude with a direction if the jury believe certain things to find for the appellee. The fifth, sixth and ninth instructions also direct the jury to consider certain things, "if shown by a preponderance of the evidence together with all facts and circumstances that may be proven by a preponderance of the evidence." The jury should consider not only such facts as are shown by a preponderance of the evidence but they should consider all the evidence and facts and circumstances in evidence. The giving of these instructions was error.

The judgment is reversed and the cause remanded.

Reversed and Remanded.

Mr. Justice Scholfield took no part in the decision of this case

April 7 –
1914 –

H B Schoffield
J –

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Gen. No. 6255- April Term, 1914- Ag. 58-

Filed Oct. 16, 1914-

Dec-2-1914- R.H- Denied-

Mike Polionos, by his next friend, Peter Polionos,
Appellee-

VS. ; APPEAL FROM MACOUPIN.

Fred A. Renner,
Appellant.

190 I.A. 416

Thompson, P.J.

This is an action on the case brought by appellee against appellant a surgeon, to recover, for damages alleged to have been sustained in consequence of the unskilled and negligent manner in which he treated a fracture of a bone in the right leg of appellee. A jury returned a verdict in favor of appellee for $200. on which judgment was rendered.

The appellee a boy of fourteen years of age, rocked an iron radiator that stood on a side walk in the village of Benld, so that it fell on him injuring his leg. Appellant was called to attend the boy and diagnosed the injury as a dislocation of the knee joint. Appellant testified that he advised the father of the boy that an X-ray picture should be taken of the limb to determine the exact nature of the injury; that he did not have an X-ray machine and that the boy should be taken to Staunton for such examinat on, and that the father made no reply to such suggestion. The father of the boy testified that appellant did not suggest the use of an X-ray machine but that Dr. Denny several days after the accident suggested it and he then made the suggestion to appellant. An X-ray picture was not taken until about two months after the accident and the picture showed a fracture of the end of the femur immediately above the knee joint. The greater weight of the evidence is that a reliable diagnosis could not be made without an X-ray picture and that

appellant made an erroneous diagnosis by mere manipulation, and gave the limb such treatment that a surgical operation was thereafter necessary. In the conflicting state of the evidence we cannot say that the verdict is against the manifest weight of the evidence.

When the boy's father learned of the accident he became angry and excited. It is contended that the court erred in refusing to permit appellant to show what the father said and did at that time. There was no connection or relation between the treatment of the patient by appellant and the acts of the father or his scolding of the boy. The objection was properly sustained.

The court instructed the jury as to the form of their verdict, giving a form to be used, if they should find for the appellee, and also a form if they should find for appellant, both written on the same sheet of paper. The trial of the case was concluded on a Saturday night. Two of the jurymen were talesmen. It was agreed that the jury might seal their verdict and deliver it to the officer, who was to return it into court on Monday morning, and the jury should be discharged. The jury after agreeing on the verdict used the form given them by the court and simply wrote in the form for appellant the words "two hundred dollars", and signed their names at the bottom of the sheet below the form for appellant. The court over the objection of appellant entered the verdict for appellee.

While the form of the verdict was irregular, it is very obvious what was the intention of the jury. If the verdict had not been discharged before the reception of the verdict, its form would have been corrected by the court before it was entered. Mere informality in a verdict which is intelligible does not warrant a reversal of a judgment thereon. There is no reversible error in the case and the judgment is affirmed.

A F F I R M E D.

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1914 –
#25 –

R. B. Shirley Jr.

96

Gen. No. 6256- April Term, 1914- Ag. No. 64-

Bliss C. White., Appellee-

VS.

Charles Libro., Appellant.

Filed Oct. 16, 1914-

; Appeal from County Court of Macoupin.

190 I.A. 418

Thompson, P.J.-

This is a suit begun by Bliss C. White to recover for rent claimed to be due ftom Charles Libro. An appeal was taken from the judgment of a justice of the peace to the County Court, where the case was tried by the court without a jury. Judgment was rendered in favor of plaintiff for $128.25- The defendant appeals.

The evidence shows that James E. Colvin was the owner of certain real estate, and that on March 19, 1906, he executed a bond for a deed whereby he agreed to convey said real estate to Ercole Libro , a brother of appellant, provided Ercole Libro paid a mortgage securing $900. to the Hillsboro Building and Improvement Association, to be paid in monthly payments of $11.64 each, and the further sum of $535- to Colvin, to be paid $100. cash, the receipt of which Colvin acknowledged and the balance in monthly payments of $2.61 per month with interest at six per cent per annum, payable monthly, and all taxes.

Ercole Libro was furnished a certificate that he was the owner of nine shares of stock in the association, and a pass book by the association. The payments were to be made to the association and to the credit of Colvin at the Gillespie National Bank and were entered on the pass book by the cashier of the bank, who appears to have been the agent of the association and Colvin.

The pass book shows that sixty two payments were madeon the mortgage to the credit of Colvin, the first in April, 1906, and the a last July , 1912, each payment consisted of $11.64- credited to the association and $2.61 in the back of the

book to the credit of Colvin. Each payment to the association is itemized. Instalment $4.50- Interest $5.25. Premium $1.89 Bliss C.White is a real estate agent and the secretary of the association. He claims to be the owner of the property, and received from the bank the payments that were made to the association and to the credit of Colvin. The record does not show how or when he became the owner.

Ercole Libro went to Europe after putting his brother, appellant in possession of the premises. The record does not show when appellant was put in possession, except that it was before January , 1911. The payments ther after were made by Charles Libro and entered in the pass book of Ercole Libro.

There is no evidence tending to show that there was any talk or agreement between any of the parties about paying rent. White testified that he didn't know there was a contract between Colvin and Libro, but thinks there was one. White also testified that he told Libro that he had forfeited his rights to the property, but that he received the payments made thereafter, and thinks he served notice of forfeiture on Ercole Libro by serving it on Libro's wife. He doesnot know when it was , but it was about two years before the trial, nor what it was, except that it was a notice of forfeiture. His evidence is very inconsistent, and although he was secretary of the association and claims to be the owner of title to the property, he appears to have known little about the matter in controversy. The proof is clear by the entries on the pass book that payments were made on the bond for a deed both to the association and the owner of the title, down to within thirty days of the beginning of this suit.

The Statute Paragraph three of section one of the Landlord and Tenant Act provides that rent may be recovered , when possession has been obtained under an agreement for the purchase of premises, and before deed is given, the right to possession is terminated by forfeiture or non compliance with the agreement, and pos -

session is wrongfully refused to be given, upon demand made in writing by the party entitled thereto. Appellant has raised the legal questions involved by propositions submitted to the court which were refused. There is no proof tending to show a demand for possession was madein writing, and a judgment in favor of appellee cannot be sustained on the evidence. The judgment is reversedwith a finding of fact, that appellant was in possession of the premises for which rent is claimed under a bond for a deed to his brother, and no demand in writing for the possession of the premises was made after possession was taken under the bond.

Judgment Reversed-

April 1 -
1914 -

T. A. Smeel -
Co - J -

98

AGenda No. 6100 October Term, A.D.1913. Agenda No.68.

THOMAS COOPER,
Defendant in Error,

v.

ROBERT BURGESS & SON,
Plaintiffs in Error,

Filed Oct. 16, 1914-

Error to Circuit Court
Fulton County.

190 I.A. 428

ELDREDGE, J.

This is an action in assumpsit, the declaration charging that defendant in error, Thomas Cooper, desired to purchase a Percheron stallion for the purpose of breeding to mares in the vicinity of his home in Fulton County, and went to the defendants, Robert Burgess & Son, at Wenona, Illinois, and told them he wanted a stallion registered in the "Percheron Book of America", or one that would be eligible to registry in the "Perchon Book of America" as kept by the Percheron Society of America; that plaintiffs in error agreed to sell him a pure bred Percheron stallion that would be eligible to registry in the "Percheron Book of America" and that he bought said stallion for $2,000; but, as a matter of fact, the defendants, instead of delivering to him a pure bred Percheron stallion eligible to registry as aforesaid, knowingly and fraudulently delivered to him an inferior and worthless stallion, not a pure bred Percheron stallion so registered as aforesaid, but a so-called French draft stallion; that when he discovered this alleged fraud he requested and demanded of plaintiffs in error that they take back the said stallion so delivered, but the defendants did then and there refuse and have ever since refused so to do; that by reason of the inferior and worthless character of the stallion delivered it was a total loss to him and that he has suffered damages to the amount of $2,000.

The trial resulted in a judgment in favor of the defendant in error and against plaintiffs in error for $700 and costs.

There are several assignments of error to the rulings of the Court on the admission of evidence. It is first insisted that a number of witnesses who testified as to the value of the stallion were not qualified. These were mostly farmers living

in Fulton County who had owned and handled stallions and the effect of their testimony was that while they had little or no knowledge of the value of French draft stallions, yet such horses for breeding purposes in Fulton county would be of little or no value for the reason that there were very few, if any, French draft mares in Fulton county. We are of the opinion that they were competent to testify on this question and that the weight of their testimony was for the jury.

The contract was an oral one, and the testimony of a witness McCamber who worked for plaintiffs in error at the time the contract was made was introduced by defendant in error in corroboration of his version of the contract. Plaintiffs in error sought to impeach the testimony of this witness and introduced testimony showing that his general reputation for truth and veracity at Wenona, where he resided, was bad. Plaintiffs in error also attempted to prove by the witness Miller that at a time four years prior to the making of the contract McCumber lived in the vicinity of Monmouth and that his reputation at that place for truth and veracity at that time was bad. The Court sustained an objection to this testimony on the ground that the time was too remote. While the trial Court has considerable discretion in determining how far back testimony of this character may be given, yet we think that a period of four years was not too remote and the evidence might have been allowed to be introduced. The evidence, however, of this witness was but cumulative and the sustaining of objection to his evidence is not reversible error. Kirkham v. People, 170 Ill. 9.

Plaintiffs in error also offered the witness Shields to prove the general reputation for truth and veracity of McCumber in the vicinity of Lewistown. Objection was made

to his testimony and it was sustained. There was no evidence to show that McCumber ever resided at Lewiston or in the vicinity thereof. The witness stated that he had known him only for the past four years and the evidence discloses that during the past four years he had resided at Wenona. It was not error in sustaining the objection to the testimony of this witness.

It is also urged that the Court erred in permitting proof of the value of the stallion in Fulton County, because the true measure of damages was the difference between the value of the stallion, if he had been as represented, at Wenona at the time and placeof his delivery to the common carrier for shipment. No objection of this character was made to the evidence of the value witnesses of the defendant in error when they were testifying in regard thereto. The objections to their testimony were specific and upon other grounds.. The questions propounded by counsel for defendant in error to his witnesses on the question of value did not contain any element of place and the questions propounded also by counsel for plaintiffs in error on the same subject to their own witnesses did not contain the element of place. Counsel for both parties on the trial did not seem to consider the element of place as material and having tried the case on that theory cannot now complain that it was erroneous.

It is also urged that the Court erred in refusing to give the first refused instruction for plaintiffs in error. The principle of law involved in this instruction is fully covered by the other instructions given. There was no harmful error in any instruction given on behalf of defendant in error.

The judgment will be affirmed.

Mr. Presiding Justice Thompson took no part in the consideration of this case.

Oct. Term
1913

Geo. H. Thompson - J.

99

Gen. No. 6110. April Term, 1914- Agenda No. 1-

Filed Oct. 16, 1914-

190 I.A. 430

The People of the State of Illinois,
Deft. in Error-

VS. ; Error to Circuit Court

Perry M'Kinzie, Fulton County.
Plff. in Error.

ELDREDGE, J.

This is an appeal from a judgment of the Circuit Court of Fulton County rendered against plaintiff in error for $1- and costs for the violation of Sec. 266, Chap. 38 Hurd 's R.S., which is as follows;-

"Whoever wilfully enters and passes over any garden , yard, or other improved field, after being expressly forbidden so to do by the owner or occupant thereof, shall be fined not exceeding $5".

The case originated before a Police Magistrate. It appears from the evidence that one Ezra Barker owns 45 acres of land in Fulton County. It is divided into two fields, 25 acres on the north and 20 acres on the south. Six or seven years before the trial the complaining witness, John M. Hoyle, made an arrangement with Barker whereby he rented said land and for that part which was to be ~~plated~~ planted to corn he was to pay as rent one half of the corn. A portion of the land was to be kept in hay and as to the hay land Hoyle and Barker were to make an arrangement each year as to what Hoyle should pay therefor, the price of which was to be controlled by the market price of hay in the vicinity by the acre. At the time the offense w is alleged tohave been committed the 25 acre field was in hay and in the spring of 1912,

when the hay was ready to be cut, Barker was out of the State, and a controversyarose about the price to be paid for the hay between Hoyle and the plaintiff in error, whom Barker hadappointed as his agent to collect the rentfortthis field of hay. Hoyle was in possession of the field and had posted notices upon the gates forbidding trespassing. He had also locked the gates with chains and padlocks. The plaintiff in error on behalf of Barkere, ~~x~~ ~~the~~ sold the hay to other parties and after Hoyle had told him to keep out of the field, he, together with the parties to whom he had sold the hay, went upon the fieldto measure the hay. Hoyle was in possession of the field and under such circumstances there was a clear violation of the Statute.

It is urged that plaintiff in error should have been arraigned and a plea of not guilty entered in the circuit court. The charge was a misdemeanor and no plea was necessary. Sec. 9-Art. 18, Chap 79 Hurd's R.S. provides that a defendant may appeal from the judgment of a Justice of the Peace in criminal cases to the circuit court, the appeal to be taken in the same time and manner, and upon the same conditions, and with like effect, and like proceedings may be had thereon as in civil cases. Sec. 72 of the same act in regard to civil cases when tried on appeal provides that the Court shall hear and determine the same in a summary way, according to the justice of the case, without pleading, in writing. The Statute does not require any arraignment ~~nf~~ or plea in cases of misdemeanors borught before a Justice of the Peace or Police Magistrate. The trial in the Circuit Court was a trial de novo and nothing more was required in that court than before the Police Magistrate. We do not consider the other errors assigned as of substantial merit and the judgment will be affirmed-

Mr. Presiding Justice Thompson took no part in the consideration of this case.

April Term
1914

Geo. H. Thompson
J.

Gen. No. 6119- April Term, 1914- Agenda No. 59-

Filed Oct. 16, 1914-

Shandrow & Kern,
Appellees.,

vs. ; Appeal from Circuit Court of

Rust, Swift & Co., Calhoun County.
Appellants.

190 I.A. 431

ELDREDGE, J.

This is a suit brought by appellees as partners doing business in Calhoune County, Illinois, against appellants, partners doing business in St. Louis, Mo., to recover an account for certain meat claimed to have been sold by appellees to appellants. The account is for $187.67. The case was originally brought before a Justice of the Peace and on an appeal to the Circuit Court the trial resulted in a verdict for appellees for said amount. On this verdict judgment was entered.

There is only one question involved on this appeal and that one of fact as to with whom the contract for the meat was made by appellees. Appellants' contention is that appellees sold and delivered the meat to one Robinson and not to appellants. In 1911 appellants were engaged in the business of building dikes and shore protections along the Mississippi River and at the time said meat was furnished had contracts for work to be done on said river between Hamburg and Grafton, Illinois. At Beech's Landing, which is between the two places was a quarry which was in charge of said Robinson. At this quarry was a camp and outfit for the purpose of quarrying the rock to be used by appellants. A number of men worked in this quarry and lived in said camp. The evidencefor appelleestends to show that Robinson was a foreman for appellant and had charge of this camp and the work of the quarry; that appellants paid the men at said quarry; that they owned the dishes that were used at said camp and most

of the tools and outfit used in the quarrying of the rock; that appellees were farmers living in the neighborhood and before they delivered any meat to said camp they interviewed James Swift, amax x a member of appellant firm, to see if they could furnish said meat and that they then madd a contract with said firm to deliver meat at said camp at 11 cents a pound; that appellees' bill for meat delivered to said camp for the monthof August was about $52 and as it was not paid promptly appellees refused to deliver any more meat until it was paid; and that thereupon appellants paid the bill with their check which was given to appellees and appellees again began delivering meat. The bill for the month of August was taken to Robinson, who marked it "O.K." and when appellees made out their bill for meat delivered in September and October they took it to Robinson, who marked it "O.K." , and then appellees sent it to appellants, who refused to pay it, and this is the account in controversy in this case.

The evidence for appellants tended to show that they had made a contract with one Golike to furnish this rock to appellants and that Golike had made a contract with Robinson to quarry the rock and load it on the barges for Golike and that appellants had nothing to do with any meat furnished to the camp and did not contract for the same.

The testimony of Robinson supports the contention of appellees. The issue was one for the jury to determine from the evidence and as the verdict is not manifestly against the weight thereof, the judgment cannot be set aside for that reason and must be affirmed.

A F F I R M E D .

April 1 - 1914 -

Harry Hoffer

102

77

General No. 6145 October Term, A. D. 1913. Agenda No. 46.

Filed Oct. 16, 1914-
Dec. 2, 1914- R.H.Denied

FRANK SPARKS,
Appellee,

vs.

ROBERT G. RAYBURN, W. O. DALE,
J. N. BLACK and F. B. VENNUM,
Partners as the HOME BANK,
Appellants,

Appeal from Circuit Court
Champaign County.

190 I.A. 438

ELDREDGE. J.

Appellants were partners engaged in the banking business in the Village of Mahomet, Illinois. Appellee recovered a judgment against them for the sum of $1550 in an action of assumpsit for an alleged balance of deposits made by appellee in the bank operated by them. Appellee opened an account with the bank in July, 1906, which was carried on until about the 10th of August, 1912. He was never furnished by the bank with a pass book. It is urged that before appellee can recover for said deposits the evidence must show proof of a demand for the same. The deposits sued for were general and there was no obligation on the part of appellants to pay the alleged balance to appellee until the same was demanded of them by him either by presentment of a check or otherwise, unless circumstances are shown which amount to a legal excuse. Brahm v. Adkins, 77 Ill. 263. Under the facts in this case we do not think that any formal demand was necessary. The testimony for appellee tends to show that for about two years prior to the commencement of the suit he had requested that he be given a pass book, that a statement of his account be made to him and that his checks be returned to him, but that appellants refused to give him a pass book, render him a statement of his account or to deliver his checks to him, and that those requests were also refused when made by counsel for appellee. The evidence further tends to show that appellants denied that any balance was due appellee. Under such circumstances

a demand would have been futile, if made, and was unnecessary. Meadowcroft v. People, 163 Ill. 56; Arnold v. Hart, 75 Ill. App.165; idem v. idem, 176 Ill. 442; Bank of Missouri v. Benoist, 10 Mo.519; Miller v. Western National Bank, 172 Pa. State 197; Pratt v. Union National Bank, 75 Atl. 313; Altman v. Phillips County Bank, 86 Kans. 930.

Appellants offered in evidence the ledger of the bank which the Court refused to admit, and this action of the Court is assigned as error. The evidence shows that a day book was kept by the bank in which the original entries of the business of the bank were made and that the ledger was made up in part from the entries taken from the day book. Several of the day books were produced and offered in evidence by appellants and were admitted. No day books were produced or offered for any dates after June 5th 1907, although many of the transactions involved in this litigation took place after that time. During the period of these transactions appellee from time to time had borrowed small sums from the bank and had given his notes therefor. Many of these transactions involved the application of funds in the payment of these notes. The evidence shows also that a note register was kept by appellants containing the entries made in regard to the note transactions of the bank. None of the note registers were produced or offered in evidence by appellants. The ledger was not a book of original entry and under the above circumstances was incompetent. It was not competent for another reason. The evidence shows that many of the items made therein did not represent the true amounts of the transactions, but were the net results of several transactions. Appellee proved several of the items of his claim by certificates of deposit issued by the bank and these were prima facie evidence of deposits by him. Braham v. Adkins, supra. The actual amounts of these deposits were not shown by the ledger, but other amounts were shown therein which were sought to be explained by subtracting from the deposits payments of notes, and in other ways. A book of account containing

items which do not represent the actual amounts of the real transactions, but have to be determined, sustained and aided by mathematical calculations made from extraneous proof is not such an account as can be admitted in evidence to refute a prima facie case established adversely thereto.

We have carefully examined the evidence in regard to each one of the fourteen items in dispute and with one exception we cannot say that the verdict of the jury was not justified by the evidence. The exception is the deposit of June 30, 1908, for $18.70, which consists of two items, one for $14.15, and the other for $4.55. We think the clear weight of the evidence shows that appellee was given credit for this deposit. The verdict of the jury fixed the amount of damages at $1350. The total amount of each one of the disputed items was $1336.76. The jury either made a mistake in adding the items, or attempted to allow interest thereon. There was no claim made for interest, the jury were not instructed to allow any and no rule was given to them by which to compute interest, consequently the verdict was excessive in the sum of $13.24. This amount added to the said item of $18.70 makes a total error in the verdict of $31.94.

Criticism is made of several of the instructions given on behalf of appellee but the same criticisms could be made to those given on behalf of appellants, and they cannot be heard to complain thereof. Under the circumstances we do not think there is any reversible error in the instructions.

If appellee will enter a remittitur in this court of $31.94, within ten days, the judgment will be affirmed for the sum of $1318.06, and each party will be adjudged to pay its own costs in this Court, otherwise the judgment will be reversed and the cause remanded at the costs of appellee.

Oct. Term —

67 1113 —

W. G. Colman

J —

Gen. No. 6177. April Term, 1914- Ag. No. 5-

Filed Oct. 16, 1914-

The People of the State of Illinois.,
Defendant in Error-

VS- ; Appeal from County Court

Horace DeFratis.,
Plaintiff in Error- Morgan County.

190 I.A. 440

ELDRIDGE, J.

This is a writ of error to the County Court of Morgan County to review a judgment enteredin said court against plaintiff in error. The writ must be dismissed for several reasons. The record does not show that any Bill of Exceptions was filed in the court below and made a part of the record. No abstract has been printed and filed in accordance with the rules of this Court. In the brief and argument of plaintiff in error what purports to be a summary of the testimony of the several witnesses is narrated, but no exceptions to any of the rulings on the evidence complained of is shown and no instructions are set out therein. There is nothing preserved or presented for this Court to consider and the writ of error must therefore be dismissed .

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Thos. F. Smith for plaintiff-
Robert Tilton for the People-

Abstracts and briefs withdrawn- Wm. C. Hippard-

April Term
1914 —

E. P. Brockhouse
J —

104

Gen. No. 6185. April Term, 1914- Agenda no. 8-

Filed Oct. 16, 1914-

John McMasters, Admr.,
Plaintiff in Error.

vs. ; Error to Circuit Court of

Madison Coal Corporation.,
Defendant in Error. Sangamon County.

190 I.A. 441

ELDREDGE, J.

This was an action on the case by plaintiff in error against defendant in error in which judgment was rendered in favor of the latter, to review which this writ of error is prosecuted.

The only errors argued in this court are confined to the action of the trial court in directing a verdict in favor of defendant and to the rulings of the court on the admission of evidence. The Bill of Exceptions does not show that any peremptory instruction was given by the court to the jury. It contains no instructions whatever, neither does it show that any verdict of the jury was returned. In order to review the action of the court in giving, refusing or modifying instructions it is necessary that the instruction be set forth in the Bill of Exceptions. Yarber v. C. & A. RY.Co.,235 Ill. 589; C. B. & Q. R.R.Co. v. Hasselwood, 194 Ill. 69; Martin et al. v. Foulke, et al., 114 Ill. 206.

The court did not err in its rulings on the admission of the evidence. We have carefully examined the evidence and on the merits the judgment is right.

The judgment will be affirmed.

April 5 -
1914 -
G. Ernest Stone

105 80

Gen. No. 6186. April Term, 1914- Agenda No. 9-

Filed Oct. 16, 1914-

L.E.Thompson.,
Appellee.,
VS. ; Appeal from Coles County
The Security Insurance Company Circuit Court-
of New Haven.,
Appellant.

190 I.A. 442

ELDREDGE, J.

Appellee recovered a verdict for $690. in an action of assumpsit on an oral contract of insurance. Judgment was rendered on the verdict, to reverse which this appeal is prosecuted.

The declaration contains a special count on an oral policy for $700., to which are attached also the common counts. The only plea is the general issue. The principal error argued is that appellee did not prove the making of the contract by a preponderance of the evidence. The contract covered a stock of merchandise and fixtures located in a store building of appellee, valued at about $1,100., and it is claimed was made between appellee and the agent of appellant. Appellee testified in substance that appellant's agent agreed to write a policy insuring said stock of merchandise and fixtures against loss or damage by fire in the sum of $700. for the period of one year commencing at twelve o'clock noon June 13, 1913, for the consideration of a premium of $9.45, and that said premium had been tendered to said agent. The fire occurred at three o'clock that same afternoon. The only persons present when the alleged contract was made were appellee, his son, a boy who was working in the store for appellee, and the agent of appellant. Appellee is corroborated more or less by his son and the boy who was working in the store. The agent for appellant denies having made any agreement to write said policy.

The conversation took place in the store of appellee on the ~~morning~~ morning of the day of the fire. The verdict is not contrary to the manifest weight of the evidence.

Some objections are made to several instructions given by the Court on behalf of appellee, none of which ~~xx~~ do we think can be sustained except possibly as to the fourth instruction, but when this instruction is read together with all the other instructions, the jury could not have been misled and it was not such harmful error as should cause a reversal of the judgment.

The judgment will be affirmed.

Mr. Justice Scholfield took no part in the consideration of this case.

April -1 -
1914 -

H-B-Schuefield-J -

Gen. No. 6189- April Term, 1914- Agenda No. 11-

Filed Oct. 16, 1914-

F.B. Sherfy,
Appellant.,

VS. ; Appeal from Circuit Court

W.A. Lachenmyer.,
Appellee- Champaign County-

190 I.A. 443

ELDREDGE, J.-

This is an action in assumpsit to recover $2400. on a promissory note executedby appellee April 2, 1913, payable to his own order for said sum and endorsed by him on theback thereof. The pleas allege that the consideration of the note was for money won at gambling. The Court directed a verdict for appellee.

In February -- 1912- appellee lost $2,400. to one W.T.B. Mathony in the city of Champaign gambling at cards in a gambling room operated by Mathony at that place. In payment of his loss he executed a note payable to the order of Mathony for said sum. The note came into the hands of the First National Bank of Champaign for collection. Appellee told the cashier of the bank that he was not able to pay the note at that time, that it was for money lost in gambling, and executed the note sued on in this case as a renewal of the original note. Sec. 151, Chap. 38, Hurd's R.S. provides that notes given in the payment of gambling debts are absolutely void. Sec. 136 of the same Chapter provides that no assignment of any such note shall in any manner affect the defense of the person executing the same. It has been repeatedly held that under the laws of this state if the original consideration of such an obligation is based upon a gambling debt or transaction, it is absolutely void, notwithstanding it may have been transferred to the hands of an innocent purchaser. Williams v. Judy, 3 Gilm. 283; Pope v. Henke, 155 Ill 617; Chapin v. Dake, 67 Ill. 295; West v. Carter, 129 Ill. 249; Thomas vs. First National Bank, 213 Ill. 261. And a note given as a renewal of a prior note so tainted, although transferred to the

hands of an innocent purchaser, is void. International Bank of Chicago v. VanKirk, 39 Ill. App. 23.

The facts were undisputed in this case and there was no error in the action of the Court directing the jury to find a verdict for appellee.

The judgment will be affirmed.

A F F I R M E D.

1914

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S. Philbrick g

1080

Gen. No. 6199. April Term, 1914- Agenda No. 20-

Filed Oct. 16, 1914-

Dec. 2, 1914-
R.H.Denied-

Shellebarger Elevator Company.,
Appellant.,

VS. ;

Jens Jenson.,
Appellee-

Appeal from Circuit Court
Ford County.

190 I.A. 449

ELDREDGE, J.

Appellee sued appellant in an action of assumpsit to recover for 2229 bushels of yellow corn at 70 cents per bushel alleged to have been sold by him to appellant. The trial resulted in a verdict for appellee assessing his damages at $1751.34, on which verdict judgment was entered.

The declaration contains the common counts only. Appellant filed in addition to the general issue a special plea alleging that it was at that time operating an elevator of Class B and received the grain in storage only, and that the elevator burned on February 14, 1911, without the fault of the company, entirely consuming its contents, which included the grain of equal grade which was held to replace the corn delivered by appellee. Issue was joined on this plea by a general replication. Appellee testified that in August, 1908 he had the corn in question in a crib on his lots in Gibson City; that on August 18, 1908, he had a conversation with Mr. Cooper, the agent of appellant, in which he asked him if he could haul his grain there for a short time and upon being informed by Mr. Cooper that he could do so, he asked how much it would cost a month and was informed by Mr. Cooper that he could store it for thirty days free of charge. Appellee on the next day hauled and delivered to appellant at its elevator 2229 bushels of corn; that on the 15th day of October following he called upon Mr. Cooper at his office in the elevator and inquired the price of corn and was informed that it was worth on that day 70 cents per bushel if it graded; that Mr. Cooper said he would give him 70 cents per bushel for the corn if it graded or 68 cents per bushel if it did not grade; that Cooper said he would ship it the next day.

The elevator burned February 14, 1911, nearly two years and a half after the alleged sale. Cooper denies there was ever any contract of sale for this corn, but that the elevator company held it in storage only. The evidence in the case as to whether there was a contract of sale, or of storage only, is very close and conflicting and there are many facts and circumstances which very strongly tended to corroborate appellant's contention that there never was a contract of sale for this corn. Under such conditions it was important that the jury should have been carefully instructed as to the law. Every instruction given on behalf of appellee is subject to criticism and some are wholly bad. The second instruction given for appellee is as follows :-

"The court instructs the jury that unless the defendant has shown by the greater weight of the evidence that at the time of the fire in question, it, the defendant, had stored in the elevator as much corn as of good quality and grade as that delivered to the defendant by the plaintiff, as it was then chargeable for to all other parties who had corn of that character stored in the elevator it will be your duty to find for the plaintiff on that issue".

What issue is meant by this instruction is not discernible from the instruction. Moreover, the jury should not have been instructed to consider how much corn the defendant had in the elevator at the time it was burned unless they first found from the evidence that the contract was one of storage and not of sale. The third instruction is as follows:

"The Court instructs the jury that the defendant has pleaded as one of his defenses, that the corn in question was stored in the elevator and not sold as claimed by the plaintiff; before you will be justified under the law to find for the defendant on that issue, you must believe from the greater weight of the evidence that defendant has shown that it, the defendant, used reasonable care and diligence to protect the corn from loss by fire".

This instruction is so palpably erroneous that it is unnecessary to discuss it. The same may be said of the fourth and seventh.

For the errors indicated, the judgment must be reversed and the cause remanded.

Reversed and Remanded.

Post Office

Gen. No. 6202- April Term, 1914- Agenda No. 23-
Filed Oct. 16, 1914-

Charles Razor, Appellee-

vs. ; R.H.Denied- Dec. 2, 1914-

Bloomington & Normal Railway and Light Company., Appellant-

Appeal from Circuit Court of McLean County.

1901.A.451

ELDREDGE, J.-

This is an action on the case brought by appellee against appellant for personal injuries received by him, in which he recovered a judgment for $700. to reverse which this appeal is prosecuted.

Front Street in the City of Bloomington runs east and west and crosses Main street and East street. The last two named streets run north and south. Appellant's street car line runs along Front Street until it reaches Main street, when it turns north on Main street. East street is a block east of Main street. The injury happened on the tracks on the north cross walk of Front street at its intersection with Main street. At this point there were double tracks, the east one being used for west and northbound cars and the west one for east and southbound cars. The car which injured appellee came from the west on Front street and at the intersection with Main street turned north on Main street and was running north at the time of the accident. On the evening of November 5th- 1912, between eight and nine o'clock it was raining and appellee, carrying an umbrella , was attempting to cross the tracks, when, as he contends, he was struck by the car. The declaration consists of six counts and charges negligence on the part of appellant (1) in the mismanagement and unskillfulness of appellant in running said car; (2) in not sounding a gong or ringing a bell; (3) in that appellant wilfully and negligently drove said car against appellee; (4) in failing to have the car equipped with a fender and proper guard; (5) in running the car

at a dangerous rate of speed and contrary to the ordinances of the city limiting the rate of speed to 5 miles her hour, and (6) in carelessly, improperly and negligently driving and managing said car, by reasons whereof of appellee was knocked down and injured.

The evidence on thee question of the speed of the car and of whether the gong was sounded is in irreconcilable conflict. The testimony for appellee tended to show the car was running at least 8 miles an hour, while that of appellant tended to show that it did not exceed 2 miles an hour. We do not think there is such a preponderance of evidence on this question on the part of appellant that would justify our interference in the finding of the jury thereon. Whether appellee was guilty of contributory negligence was a question of fact for the jury to determine from all the evidence in the case. Certain hypothetical questions were propounded to medical expert witnesses on behalf of appellee which were clearly erroneous. After long statements of assumed facts the questions concluded, in substance, "upon those assumed facts and upon your own knowledge gained by personal examination of the plaintiff, in your judgment is his present condition the natural and probable result of the above injury"? Following which the question was asked, "Is the injury permanent, basing your answer on the assumed facts"? Substantially the same questions were asked of three different expert witnesses. The rule is that a witness cannot be permitted to give his opinion on the very fact which the jury is to determine and this rule is no different when a medical expert testifies than when any other kind of an expert testifies. Schlauder v. C. & S. T. Co. 253 Ill., 154; I.C.R.Co., vs. Smith, 206 Ill., 608; Chicago v. Didier, 227 Ill., 671. It does not appear, however, that the extent of the injuries was controverted by appellant on the trial. The evidence shows that the surgeon of appellant examined appellee and attended him for several days after the injury, but was not produced by appellant to testify in the case. No testimony as to the extent of appellee's

injuries was off red by appellant. The verdict of the jury is not large if the injuries received were such as the evidence for appellee tends to show. Appellant therefor could not have been prejudiced by the admission of the expert testimony.

Complaint is made of the giving of the second instruction on behalf of appellee. This instruction was approved in the case of Smiley v. East St. Louis Ry. Co.- 256, Ill. 482. The criticism of the fourth given instruction is that it assumes that the car struck appellee, while it was the contention of appellant on the trial that appellee walked into and struck the car. We do not think the jury could have been misled by this instruction. We can see no objection to appellee's fifth, sixth and seventh instructions. No complaint is made of the action of the trial Court in refusing to give any instructions offered on behalf of appellant. The contention that there was a variance between the declaration and the proof is without merit.

The judgment will be affirmed-

April Term
1914 –

37 –

C. D. Myers, J.

115

GENERAL NO. 6224. APRIL TERM, A. D. 1914. AGENDA NO. 41.

Filed Oct-16-1914

DAVID A. TEEGARDEN, Appellee,

vs

SUPREME TRIBE OF BEN-HUR, Appellant.

Appeal from Circuit Court Vermilion County.

190 I.A. 474

ELDREDGE, J.

This is a suit instituted by appellee against appellant upon a certificate of beneficial membership issued to Rosa A. Teegarden, deceased wife of appellee, in her lifetime. The certificate was for the sum of $500. The jury found the issues for appellee and returned a verdict for said amount, on which verdict judgment was entered.

The declaration is in the usual form in such cases, and to which appellant filed the plea of general issue and four special pleas. Three of the special pleas allege, respectively, that certain answers made by said Rosa A. Teegarden in the application for the certificate were false and untrue and that said answers were warranties and that said certificate was void by reason thereof. The fourth special plea was a plea of tender of the money paid by appellee together with the costs of the suit to the date of the tender. Appellee replied double to these pleas and the first replication averred the truth of the answers in said application. The second, third, fourth, fifth and sixth replications reply to the first, second and third special pleas and aver, in substance, that appellant has waived its right to object to the validity of the certificate as to one of the answers because one T. T. Michael, who was then and there the duly authorized agent of, and acting for, appellant propounded the question mentioned in the first special plea to Rosa A. Teegarden and that she answered the same truthfully, but said agent, without the consent or direction of the insured, upon his own initiative inserted a false and different answer in said application; that as to the questions set out in the

second and third special pleas said agent never asked said questions of her and that the answers inserted in said application were the answers of said agent and not of the insured; and also that the insured answered said questions truthfully, but said agent wrote false and different answers in said application upon his own initiative and without the consent or direction of the applicant. The seventh replication was one of estoppel and averred that appellant from the date of the certificate of beneficial membership to the time of the death of the insured with full knowledge of the facts set forth in its special pleas, by and through its duly authorized agent, demanded and received of insured the premiums falling due on said certificate, and the insured, relying on the validity of said certificate and induced by the demands and receipt of premiums by the defendant, paid the same. The eighth replication averred that appellant, after the death of the insured and having full knowledge of the facts set forth in its special pleas, through its duly authorized agent demanded and received from appellee a premium on said certificate, and appellee, relying upon the validity of said certificate and induced by said demand, paid said premium to appellant. The ninth replication denied the tender pleaded in appellant's fourth special plea. To these replications rejoinders were filed by appellant.

Appellee and his wife, Rosa A. Teegarden, were living on Norman Street in Danville, Illinois, on November 26th 1910, the date she made application to appellant for beneficial insurance. The application signed by her consists of three parts. Part I contains questions as to the age, date of birth, residence, etc., and is usually filled out by the agent soliciting the insurance and has one place for the signature of the applicant. Parts II and III are for the medical examination. There are three places in parts II and III for the signatures of the applicant. The application was signed under date of November 26, 1910, in four places on the application.

W. T. Michael was what was called a deputy of appellant and was authorized to solicit insurance, take applications and collect the first premiums, and it was also the deputy's duty to write up Part I

of the application and then turn it over to the medical examiner who was presumed to examine the applicant on parts II and III of the application.

The testimony for appellee tended to show that said Michael called at the home of appellee between eight and nine o'clock on the evening of the date of the application; that the only parties there present at that time were appellee, his wife Rosa A. Teegarden, and Michael, the deputy or agent; that Michael was given a table and he spread the application down on it, asked for the family record, filled in the application and stated at the time to appellee and his wife that there were a lot of questions that were not necessary to ask, that there was a lot of red tape about them, that he knew his business and called upon Rosa A. Teegarden to sign the application, and that she signed it in the several places; that appellee asked Michael if there was more writing to do about the matter and he answered, "It is all over. I am doing the doctor's part for him because he has got lots to do and he don't get much money out of it anyway." The evidence further tended to show that the answers complained of, made to Michael at this time, were truthfully made. The evidence further tended to show that Michael collected from appellee his fee and the doctor's fee, and that he said he would guarantee the application would go through or he would send all the money back if she did not pass the examination.

Parts II and III of the application are also signed by Dr. Clinch, the medical examiner, who testifies that he asked the questions enumerated in parts II and III and filled in the answers himself, but further testified that he had no personal recollection of the examination and that his evidence is based wholly upon the fact that his signature is signed to parts II and III and that the answers to said parts are in his handwriting. The evidence for appellee tends to show either that the answers in Parts II and III were written by Michael or that said parts were signed by the applicant while they were yet blank and the answers were thereafter filled in by the medical examiner either from an examination of the applicant or from information received by

the medical examiner from Michael. The burden of proving the pleas was upon appellant and the contention of appellee is more or less corroborated by the fact that Mrs. Teegarden's signatures appear to have been signed to all parts of the application on the same date and it is not claimed that the medical examiner was present when Michael presented the application at her home. Appellee's contention is further corroborated to some extent by the fact that Michael himself was not produced by appellant to testify in the case, and no explanation is shown why he did not appear as a witness.

There was a direct conflict in the evidence upon these issues and the judgment cannot be disturbed on the ground that the verdict is contrary to the greater weight thereof.

It is earnestly insisted by appellant that the Court should have directed a verdict on the ground that said answers were warranties and that appellant could not be estopped from setting up these defenses by any fraudulent acts of Michael, and many cases from other jurisdictions are cited in support of this contention. The rule contended for by appellant has never been held to be the law in this State. In the case of Mancock Life Ins. Co. v. Schlink, 175 Ill. 284, the Court said, "A general agent clothed with power to solicit insurance, receive the application and forward it to the Company, receive and deliver the policy and collect the premium, has power to waive a condition of the policy notwithstanding that power is negatived by provisions in the policy and his contract of employment." To the same effect also is the case of Metropolitan Life Ins. Co., v. Sullivan, 112 Ill. App. 500.

In the case of Johnson v. Loyal Neighbors of America, 253 Ill. 570, where the facts were very similar to those in this case, and where the application was taken by an agent pursuant to the request of the district deputy of the association the Court said, "The Appellate Court held the evidence warranted the conclusion that Franer, in taking the application of Mrs. Johnson, was the agent of plaintiff in error, and we agree with that view. His knowledge was therefore the knowledge of his principal. If, as the evidence of defendant in error

tends to show, Mrs. Johnson made true answers to the questions propounded, but Franer, the agent, wrote false answers, plaintiff in error has waived its right to object to the validity of the benefit certificate on the ground that Mrs. Johnson's answers were warranties. (Royal Neighbors of America v. Boman, 177 Ill. 27; Farrenkopf v. Holm, 237 id. 94). The principle applied in these cases is not new in this State but has been uniformly announced and adhered to in a long line of cases. Decisions of courts of other jurisdictions holding a contrary view have never been followed in this State. This rule is not affected by the fact that a copy of the application was attached to the benefit certificate, and there was printed in the certificate a request to the holder to read the application and if any of the answers were incorrect to notify plaintiff in error's recorder." To the same effect also are the following cases, Jones v. Knights of Honor, 236 Ill. 113; Orient Ins. Co. v. McNight, 197 Ill. 190. Michael's knowledge must be held to be the knowledge of appellant, and the latter is estopped from setting up said defenses.

What we have said above disposes of the alleged errors in the giving and refusing of the instructions. There was no reversible error in the admission of evidence.

The judgment of the Circuit Court will be affirmed.

#54 –

April Term –
1914 –

E. R. E. Kimbrough, J.

118

Gen. No. 6247. April Term, 1914-. Ag. NO. 53-

Filed Oct. 16, 1914-

E.A.Stewart.,
Appellee-

VS. ; Appeal from Circuit Court

Chicago, Bloomington & Decatur McLean County .
Railway Company.,
Appellant.

190 I.A. 484

MILDREDGE, J.

Appellee brought suit against appellant to recover for the value of a horse killed by one of appellant's electric cars upon its right of way during the night of July 31, 1910. The declaration charges that it was the duty of appellant to keep and maintain suitable and sufficient cattle guards to prevent animals from going upon defendants right of way; and that it negligently failed to keep and maintain such suitable and sufficient cattle guards as provided by the Statute at the point where plaintiff's horse passed over and upon the right of way, by reason whereof said horse was killed. It was stipulated on the trial that the value of the horse was $250. The jury returned a verdict in favor of appellee assessing the damages at $250. and also allowing attorney's fees to the amount of $25. This case was here on a former appeal and is reported in 180 Ill., App. 608. The evidence for appellee tended to show that the horse broke out of a pasture and wandered along the highway to the railroad crossing and passed over the cattle guard on to appellant's right of way. The only defense made was that this cattle guard was of "standard" construction and was the same kind used on a number of other railroads. The evidence for appellee shows that stock had been seen to pass over this cattle guard on numerous occasions. The fact that such stock had passed over this cattle guard on numerous occasions shows that it was not such a cattle guard as the statute contemplated and the Statute cannot be amended as to its

requirements by general usage or custom among the railroads.

Criticism is made of the giving and refusing of certain instructions, but there was no substantial error therein.

Complaint is also made that the jury rendered two verdicts, one for the damages to appellee and the other fixing the amount of attorneys' fees. We fail to see how there could be any prejudicial error in this.

The judgment will be affirmed.

A F F I R M E D.

April 5 -
1914 -
C. A. Hughes

119

Gen. No. 6250. April Term, 1914- Agenda No. 56-

Filed Oct. 16, 1914-

Belle Bates,
Appellee-
vs. ; Appeal from Cirfuit Court
Danville Street Railway and Light Company, Vermilion County .
Appellant.

190 I.A. 486

ELDREDGE, J.

Appellee sued appellant in an action on the case to recover personal injuries while riding as a passenger on one of appellant's cars on May 25th, 1911. According to her testimony ,,, after she had mounted the car and entered the vestibule, it was suddenly ~~xxxxxx~~ started with a jerk causing her to fall backwards and strike the small of her back against the controller box , causing a tearing sensation in her abdomen , resulting in severe hemorrhage. The trial resulted in a verdict assessing plaintiff's damages at $350.

It is first urged that the verdict is contrary to the evidence. Two juries have passed upon the facts of this case, each one finding in favor of appellee . After the first trial, the trial court set aside the verdict and granted a new trial. While the evidence is conflicting, two juries have heard it and there several juries have found the facts in the same way and there is evidencein the record tending to sustain their verdicts the judgment will not be reversed upon the facts . Parmly v. Farrar, 204 Ill. 38.

Counsel for appellee asked the plaintiff on the trial if she was a married woman and had a family, and before an objection could be interposed, she answered that she had. The answer was stricken out by the court . While the question and answer were erroneous and in some cases would be ample cause for reversal, notwithstanding it was stricken out by the court

(I.C.R.R.Co. v. Souders, 178 Ill. 591), yet, as the effect of such a question and answer could be only to enhance the damages and as the damages assessed in this case by the jury were very small for the injuries complained of, we do not think it had any harmful influence.

We do not think the other errors complained of in the admission of evidence were of such importance as to be reversible error. The Bill of Exceptions contains an affidavit filed in support of a motion for a new trial stating that during the closing argument of counsel for appellee she burst out into a loud fit of crying and was guilty of other conduct which tended to rouse the prejudice and passions of the jury and that counsel for appellee thereupon in his argument stated to the jury, "When that woman's soul dissolves in tears you know that she is telling the truth". The remark was objected to by appellant's counsel and the court remarked "Keep within the evidence". The conduct of appellee does not seem to have been objected to by appellant at the time and as to the remark of counsel, in his argument it was not, under the circumstances, a reversible error. The verdict of the jury does not indicate that it was greatly influenced thereby. We have considered all the other questions raised, but are of opinion that they are of insufficient weight to cause a reversal of the judgment.

The judgment will be affirmed.

April 4 -
1914 - -

E. R. E.
Kimbrough -
J -

120

GENERAL NO. 6253. APRIL TERM. A. D. 1914. AGENDA NO. 71.

Filed Oct. 16, 1914-

HATTIE F. KAUFMAN,
Appellant,
vs.
ADAM HELMICK AND HOWARD HELMICK,
Appellees,

Appeal from Circuit Court DeWitt County.

190 I.A. 487

ELDREDGE, J.

This is an action of assumpsit to recover on a promissory note purporting to have been executed by appellees payable to the order of J. F. Newbanks for the principal sum of $825. Said note was assigned by Newbanks to appellant. Appellees filed the plea of general issue, verified, and also a special plea averring that they did not make and deliver said note, also verified. The jury returned a verdict in favor of appellees on which verdict judgment was entered, and from which this appeal is prosecuted. The evidence for appellant tends to show that Newbanks had signed as surety several notes executed by appellees and one G. W. Helmick, and that said notes becoming due Newbanks induced appellants to sign the note sued on in this case, payable to his order, so that the same might be negotiated and the proceeds used in the payment of the other notes on which he was surety; that Newbanks took the blank note to appellee, Howard Helmick, who lived at Farmer City, and that Howard took the note to his father, Adam Helmick, and returned with it with the name, "Adam Helmick" signed thereto; that Howard then signed his name to the note in the presence of Newbanks and the witness Barnett and the note was delivered to Newbanks; that Newbanks took said note to the office of Stone & Gray at Clinton, for the purpose of negotiating it; that Stone was well acquainted with both appellees and called Adam Helmick on the telephone and told him that he had a note payable to J. F. Newbanks for $825 signed on the 14th day of August, 1912, by Adam and Howard and that Newbanks had a chance to sell it and

wanted him, Stone, to sell it, and that he would not do so until he had called him up to see whether it was genuine, and that Adams replied, that the note was all right, that it was their note and that it was made to take up some obligations, one of which was to Harve Campbell; that thereupon Stone took the note to Edward Freudenstein, through whom it was sold to appellant, who was Freudenstein's sister; that subsequently Adam Helmick came to Freudenstein's store and stated to Freudenstein that he had received notice that his note was due and that he would like to have an extension of time, and that Freudenstein told him he was sorry, but that the money was needed on the note and that it was due, and that Adam thereupon said he would try to arrange for the payment of it; that after said note had become due both Howard and Adam came to see Freudenstein about the note and asked to see the note, and that Adam asked Howard, "Where did we give that note, or sign it," and that Howard replied that it was in a hardware store or a store in Farmer City; that the proceeds derived from the sale of this note were used by Newhants in paying the other notes heretofore mentioned; that Adam's name was signed to said note by Howard with his consent.

The evidence for appellees tended to show that neither of them signed this note nor ratified their signature.

Under this state of the proof it is insisted that the Court erred in the giving of several instructions for appellees. The seventh instruction given for appellees is as follows:

> "You are instructed that the plaintiff before she can recover in this case must prove that the signatures to the note in question are the genuine signatures of the defendants by a preponderance of the evidence. And if, after considering all the evidence in the case, you believe from the evidence that the plaintiff has failed to prove by a preponderance of the evidence that the signatures are those of the defendants, then your verdict should be for the defendantson that issue."

The fifth instruction given for appellees is as follows:

"The Court instructs the jury in this case that the defendants do not have to prove that they did not sign the note in question, but the burden of proof is upon the plaintiff to prove that alleged claim'"

Under the evidence in this case the above instructions are clearly erroneous, as they entirely ignore the issue of the ratification of the execution of the note by acknowledging the same to have been executed by appellees and by appellees receiving the benefits from the proceeds thereof.

Hefner vs. Vandolah, 62 Ill. 483, idem v. idem, 57 Ill. 520; Smith v. Newton, 38 Ill. 230; Gleason v. Henry, 71 Ill. 109; Reynolds vs. Ferre, 86 Ill. 570. Chicago Edison Co. v. Fay, 164 Ill. 323.

The judgment must be reversed and cause remanded.

Apr. 25 -
1914 -
M. C. Cook

121

GENERAL NO. 6258 April Term, A. D. 1914. Agenda No. 65.

File 8-C-16-170

KINGAN & COMPANY, LT'D.
Appellant,
vs.
P. J. Breen,
Appellee,

Appeal from Circuit Court Edgar County.

1901.A.489

ELDREDGE J.

Appellant sued appellee in assumpsit to recover an account of $116.57 and accrued interest. The declaration consists of the common counts and the plea is the general issue with an affidavit stating that the nature of the defense is that appellee has paid to the authorized agent of plaintiff the whole of said demand. The jury returned a verdict for appellee on which judgment was entered, to reverse which judgment this appeal is prosecuted.

The only error argued by appellant is that the proof does not sustain the plea that the agent of appellant, to whom the payment was made, was authorized to collect and receive the same.

Appellant is engaged in the sale at wholesale of meats and lard, with its principal office at Indianapolis, Ind. For four or five years prior to the transaction involved in this case one J. A. Denny was a traveling salesman for appellant and was first introduced to appellee, (who was a merchant at Metcalf, Ill., and a regular customer of appellant), by the traveling auditor of appellant, who stated to appellee that Denny would be appellant's representative in that territory and would take care of appellant's interests therein thereafter. From that time down to March, 1913, Denny called upon appellee about every two weeks and received from him orders for meats and lard, and the evidence shows that it was customary on the succeeding trip for Denny to present a statement of the last previous order to appellee and appellee would pay the same to Denny. Sometimes these payments were in cash, and sometimes

were made by check payable to appellant or to Denny. Denny would thereupon either give appellee a receipt or credit the statement for the amount. Denny called on appellee on February 29th 1912, and received his order for goods amounting to $116.57 and appellee received the goods some days later. On March 23rd Denny came into appellant's store and asked him to pay his last invoice. Appellee asked Denny for the statement and was told by him that his statements were at Tuscola, and that he should have been in Tuscola the night before. Appellee told him that his own invoice received with the goods was at his house, and Denny told him to make the check as near the amount as he could remember and that he would correct it on his next trip, that he was in a hurry to make his train and would not have time to wait for appellee to go to the house and get the invoice. Appellee started to write a check to appellant Company when Denny requested him to make the check payable to him personally, as he needed some expense money. Appellee thereupon wrote a check for $118 payable to Denny. A few days later the traveling auditor of appellant called on appellee and asked him for a settlement of this account. Appellee told the auditor that he had paid the account to Denny. The auditor then told appellee that Denny had been suspended from service with appellant Company pending an investigation, and that he was checking up the accounts of the Company with Denny's customers. Sometime later appellee called on appellant at its office in Indianapolis in regard to this account and was informed by the auditor of appellant that Denny had no authority to receive the money as he was suspended pending investigation, and when appellee complained that appellant had not notified him of this fact he was informed that appellant had not notified its trade because if they found Denny was not short they might want to send him back and it would be embarrassing after sending out such notice.

It appears from the evidence that appellee had been a regular customer of appellant, placing his orders through Denny,

their traveling salesman, substantially every two weeks for four or five years and during that period had purchased from appellant meats and lard to the amount of about $10,000 and that during the last two years his purchases from appellant had amounted to about $2,700 annually. Denny had collected substantially all of this money for appellant, though in a few instances appellee testifies he might have remitted direct to appellant. Appellant having recognized and ratified the acts of Denny in collecting these accounts for so many years and for such large amounts must be held to have held out to appellee that he had authority under his agency to collect the same.

No other question is presented for our consideration and the judgment will be affirmed.

Mr. Justice Scholfield took no part in the consideration of this case.

124

Gen. No. 6114. October Term, 1914- Ag. No. 22-

Filed Oct. 16, 1914-

Thomas Sylvester.,
Appellant.,

VS. ; Appeal from McLean Circuit Court.

Bloomington and Normal Railway and Light Company.,
Appellee-

190 I.A. 495

SCHOLFIELD, J. This is an action in case brought by Thomas Sylvester against the Bloomington and Normal Railway and Light Company to recover damages for the killing of a horse and the destruction of a wagon owned by plaintiff alleged to have been done by the negligence of defendant. A trial was had before a jury and at the close of plaintiff's evidence, the court instructed the jury to find the defendant not guilty. A motion for a new trial was made and overruled; judgment was entered on the verdict for defendant, and the plaintiff has appealed to this court.

The defendant at the time of the injury owned and operated an electrict street car line over Fell Avenue in the Town of Normal. Fell Avenue runs north and south and is one of the main streets connecting Bloomington and Normal and is a much travelled street. On October 24th- 1911, the night of the accident on the east side of Fell Avenue a short distance north of Ames Street there was a rock pile three or four feet high and extending from the curb line on the east to within three or four feet of the east rail of defendant's car track; and just north of this rock pile there was a sand pile which extended from the east curb, to within five or six feet of the east rail of said Company's track. On the rock pile was a red lantern signal light. At about seven o'clock that night plaintiff's servants were driving a team of horses and wagon belonging to plaintiff, north on the east side of Fell Avenue, when they came in sight of said signal light, and when they came near said pile of rock they saw that they were compelled to drive around the rock pile, and to do this

they were compelled to drive on defendant's car track.. When they had come within about ten feet of the rock pile and were just ready to turn onto said track, the street car was from eight hundred to one thousand feet south of them. The horses at this time were moving at the rate of three to three and a half miles per hour, and just as the horses an wagon were going on the track the street car was about four hundred feet south of the rock pile. The team had gone far enough to get around the rock pile and the driver had turned them off the track and toward the sand pile when the rear end of the wagon was struck by the street car going north on said track, with such force as to demolishthe wagon and break the back of one of the horses, from which injury the horse died within less than five hours.

The additional count

The additional count in the declaration alleges the plaintiff's servants were using all care and caution for the safety of the wagon and horses and charges the defendant with negligence in failing to equip said motor car with a good and sufficient head light so that objects on said track in front of said car could be seen by its motorman; that the car was negligently running at a high rate of speed, to wit;-thirty miles per hour;and that it failed to give reasonable or proper warning to plaintiff's servants of its approach.

The proof introduced by plaintiff tended to sustain the allegations of the declaration. It tended to show the car was running between thirty and thirty-five miles an hour; that the head light was but a sixteen candle power reflector; that it was rusty and that an object could not be seen ahead of the car at a greater distance than twenty-five or thirty-feet and that no bell was rung nor whistle sounded.

If there is any evidence which fairly tends to support the plaintiff's case it must be submitted to the jury and the weight and credit to be given it is for the jury- Libby, McNeil & Libby v. Cook, 222 Ill- 210.-

It was not negligence per se for plaintiff'sservants to drive on the track under the circumstances shown by the evidence and whether or not they were guilty of contributory negligence, in so doing was a question of fact to be determined by the jury under the ~~xxxx~~ ~~xxxxxxxxxx~~ instruction of the court. The Chicago Union Traction Co. v. Lars R. Jacobson, 217 Ill. 404. The court erred in taking the case from the jury and instructing them to find the defendant not guilty. The judgment is reversed and the cause remanded.

Reversed and remanded .

Pamphlet Box

36

26

GENERAL NO. 6120. APRIL TERM, 1914. AGENDA NO. 60.

CHARLES F. BRYANT,
Defendant in Error,

vs

CHARLOTTE M. AYERS, CORA FLEMING, and THOMAS J. DANISON/
Plaintiffs in Error.

Filed Oct. 16, 1914-

Dec. 2, 1914- R.H.Denied-

ERROR TO DEWITT.

190 I.A. 499

SCHOLFIELD J.

Defendant in error recovered a judgment in the Dewitt Circuit Court against the plaintiff in error and Arthur F. Miller for $175., for commission alleged to have been earned in procuring a loan of $12,000, under a written contract between them.

The declaration consisted of a special count on the contract and the common counts. A copy of the contract was attached to the declaration. Plaintiffs in error are three of the children of Louisa Danison, deceased, who died owning 160 acres of land in Dewitt County. Arthur F. Miller who was one of the co-defendants of the plaintiffs in error is the grantee of one of the children of Louisa Danison, deceased. Charles Ayers is the husband of the plaintiff in error Charlotte Ayers. The defendant in error is a broker and loan agent; and secured loans for his customers and applicants from the Franklin Life Insurance Company, and Sangamon Loan and Trust Company. The 160- acres of land left by Louisa Danison deceased, had been partioned and was to be sold under a decree of sale in partition by the Master in Chancery on the 19th day of August 1911, at the Court House in Clinton. The plaintiffs in error and Arthur F. Miller wanted to bid on the land at the sale to protect their interests and in case the land should be struck off to them needed money to pay on the same. In July 1911 the said Charles Ayers acting for the plaintiffs in error and Arthur F. Miller applied to the defendant in error for a loan. He explained to the defendant in error that the land was to be sold at a master in

Chancery's sale on August 19th, following and that four of the interests wanted to borrow $12,000 and would have to have the money in Clinton on the 19th of August to pay on the sale. The terms of sale were explained to the defendant in error and he said that he could have the money for them on the 19th of August. An application was then made out but not signed, and was taken by the defendant in error to Springfield and submitted to the Franklin Life Insurance Company. Defendant in error within a few days reported to Mr. Ayers that the Company would make the loan of $12,000 and have the money in Clinton on the 19th day of August for the use of the borrowers. The written contract sued on was then prepared and is as follows: "Witness this agreement entered into by and between Cora Fleming, Thomas J. Danison, Charlotte M. Ayers and Arthur F. Miller, parties of the first part, and C. F. Bryant the party of the second part, that party of the second part agrees to furnish the sum of Twelve Thousand Dollars on August 19th, 1911 as a loan upon what is known as the Danison farm located in Nixon Township in Dewitt County, Illinois, at the rate of 5-1/2 per cent interest for a period of ten years with prepayment privileges of any multiple of hundreds at the end of the second year and to pay the agent C. F. Bryant a commission of $240, or 2 per cent commission.

"Said land to be sold at a Master in Chancery's sale and said first parties to buy said land at a price at as high as $210 per acre if necessary to purchase same. It is also agreed that in case the said parties of the first part fail to purchase said land that they are to pay all expenses of George J. Cable for appraising the land, also the expense of the examination of the abstract and also any necessary expenses incurred by the said C. F. Bryant. And if said loan is made all the said C. F. Bryant is to receive is the said $240."

"It is also agreed that the expenses and reasonable compensation shall be paid Ira L. McKinnie for being here on day of sale and closing deal."

The matter ran along until about the middle of August when defendant in error notified Mr. Ayers that the Company had turned down

the application on the ground that the applicants did not have title to the property. Defendant in error and Ayers then went immediately to Springfield to the office of the Insurance Company and had a conversation with Mr. Scott and Mr. McKinnie a clerk in the loan department. The evidence is in direct conflict as to what took place at this meeting. Defendant in error and McKinnie testify that the situation of the title was there explained to Ayers and that he could get no title to the land even if he purchased it, short of twenty days after the sale, and until the sale was approved by the court and that the Insurance Company would hold the money until that time, or a period of twenty or thirty days. Ayers denied this and testifies that Mr. Scott the President said they would not hold the money for them until that time. Afterward an arrangement was made by which plaintiffs in error, together with Mr. Miller borrowed $1000 of the Dewitt County National Bank. Defendant in error claims he made the arrangement with the Bank for the $1000, and Ayers claims that he did. An arrangement was then made with the Master in Chancery by which he agreed to accept $1000 as the amount of cash required to be paid on the day of the sale, instead of one-fourth of the purchase price, as provided by the decree. On August 19th the land was bid off by Ayers for Miller and plaintiffs in error. Afterward at the request of Ayers the sale was reported as having been made to Mr. Lyman Reeser and Mr. Orrie Reeser.

This action was based on the written contract entered into between the parties. The contract and the evidence shows that the parties wanted the money for the purpose of protecting their interest in the land and for no other purpose. The defendant in error agreed to have the money for them on the 19th day of August. There is no pretense that the money was furnished on that day or any other day or that the contract was in any way complied with. In order for the defendant in error to have recovered he must have had the money at Clinton for the use of the borrowers on the 19th day of August. Not having it there on that day he was not entitled to recover compensation under the contract As he was relying on the contract he could not recover on the quantum

meruit. Taking the defendant in error's own view of the testimony as to what occurred at Springfield as to whether or not there was any arrangement by which the money was to be held, the plaintiffs in error did not nor either of them ever have any notice of the fact. And any statement that may be claimed that Ayers made was without authority from the plaintiffs in error and was not binding on them. The contract was in writing and the defendant in error relies on that and not having complied with the terms of the contract he cannot recover. The judgment is reversed with a finding of facts that the defendant in error agreed to furnish the plaintiffs in error and Mr. Miller $12,000 on the 19th day of August 1911 and did not do so and is not entitled to recover any commission.

Judgment reversed. with finding of facts.

April Term
1914 —

#4

A. G. Coleman

Gen. No. 6126- October Term, 1913- Ag. No. 31-

Filed Oct. 16, 1914-

Anna O'Horn,
Appellee-

Dec. 10,1914- R.H.Denied-

VS. ; Appeal from Fulton.

Illinois Central Electric Railway.,
Appellant.

190 I.A. 502

SCHOLFIELD, J.

This is an action on the case by the appellee against the appellant to recover damages on account of a personal injury alleged to have been received by appellee while she was traveling as a passenger on one of the cars of appellant between Canton, Illinois, and a station called Brereton, as a result of a collision between the car upon which appellee was travelling and another car being run by appellant in the opposite direction on its railroad. A trial was had by a jury which resulted in a verdict in favor of appellee and against appellant for $1500., on which judgment was entered and from which judgment this appeal is prosecuted. The damages averred are injuries to her person, money expended by way of doctors' and nurses' bills in endeavoring to be cured of her injuries, and for damages to her clothing.

It is first contended that the declaration does not state a cause of action. The declaration consists of four counts, each avers that the appellant was the owner and operator of an electric railroad from the City of Canton to the village of Morris in Fulton County, Illinois, on which it operated motor cars for the conveyance of passengers for reward; that appellee became a passenger thereon to be carried from Canton to Brereton and that it was the duty of appellant to use the highest degree of care to safely convey her on said car, yet the appellant not regarding its duty negligently ran said car against another car of appellant whereby appellee while in the exercise of due care was injured, etc. We hold that the declaration states a good cause of action.

It is next contended that the verdict is contrary to the evidence. The evidence shows - that the collision was because of the negligence of appellant, that appellee was a passenger and by reason of the accident she lost some time, her clothing was soiled by blood from other parties who were injured or killed in the accident. There is no defense to the cause of action and the only question for the jury was the amount of damages, so that it is clear a verdict in favor of appellee is not against the weight of evidence.

It is next urged the court erred in refusing to give instructions 30 to 41 asked by appellant. The court gave twenty-nine instructions for appellant and five for appellee . The jury were fully instructed on every question in the case and there was no error in refusing to give the instructions asked for. It is argued that instruction four given for appellee is erroneous in that it authorized a recovery for such sum or sums of money shown by the evidence she has paid or become liable for by reason of reasonable charges for medical services if any rendered necessary by reason of such injuries and instructed the jury to award her such sum as it believed from all the facts and circumstances in evidence will compensate her for the damages sustained by her as the proximate result of her injuries, and also authorized the jury to allow all moneys she had paid out or become liable for. The instruction is technically erroneous in not limiting the jury on the question of damages. Facts and circumstances shown by the evidence which however have no tendency to prove damages should not be considered on that question. The 5th- 23rd- 24th- 27th and 28th instructions given for appellant are on the question of damages and appellant could not be harmed by appellee's instruction.

It is also contended the verdict and judgment are excessive The proof does not show a cut or scratch of any kind to the person of appellee, and she only claims a bruise on her knee but which did not interfere; she is a school teacher and in less than two weeks after the accident went to work teaching.

Immediately after the accident she rode on a hand car standing up from the place of the accident to her boarding house. The evidence does not show any permanent or serious injury as the proximate result of the accident but the evidence does show that the condition from which she now claims to be suffering are not the result of the accident. If appellee will within ten days remit her judgment down to seven hundred dollars the judgment will be affirmed at her costs, Otherwise the judgment will be reversed and cause remanded because it is excessive.

Oct - Dec.
43 - 1913 -

H. M. Haggner.
J -

Gen. No. 6142- October Term, 1913- Ag. No . 43-

Filed Oct. 16, 1914-

Mrs. N.L.Cope.,
Appellant.,

VS- ; Appeal from Christian.

T.W.Brents, Sheriff of Christian County and Frank Cheney.,
Appellees.

190 I.A. 504

SCHOLFIELD, J.

This is an action of replevin instituted by appellant against appellees to recover the possession of certain property which the appellee as Sheriff levied on and took possession of as the property of one B.W.Lee, against whom he had an execution and which property the appellant claims she by her agent was in possession of under a chattel mortgage and bill of sale executed to her by the said B.W.Lee.

It is urged by appellant that the court erred in permitting the appellee after both parties had rested to re-open the case and introduce in evidence the judgment upon which the execution was based and the levy made. This was not error. It was a matter wholly within the discretion of the court whether to admit the evidence or not and there was no abuse of that discretion in this case. Ordinarily the exercise of such discretion is not subject to review. City of Sandwich v. Dolan, 141 Ill 430- Mazy v. Kinzel, 19 Ill., App., 571- The case must be reversed because of erroneous instructions given for appellees.

The first instruction is erroneous in that it instructed a verdict and does not require the jury to find the facts from the evidence and also leaves it to the jury to say what is a valid mortgage wit out telling what constitutes a valid mortgage.

The second instruction is erroneous in that it tells the jury that if any witness has knowingly and wilfully testified

falsely to "any material fact or allegation etc". It should have been to any "fact material to the issues etc".

There is no evidence on which to base the fifth instruction nor any plea alleging that there was no consideration for the mortgage.

The sixth makes no mention of the claim that appellant was in possession of the property. It entirely ignores the defense. There is no evidence on which to base the seventh instruction. The tenth does not correctly state the law for the reason that if possession is taken under an unacknolledged mortgage before possession is taken under the execution possession willdefeat the execution. For the errors indicated in the instructions the cause is reversed and remanded.

Reversed and Remanded.

Oct Term
1913
64
Lt Fire Bridge
J

130

GENERAL NO. 6163 APRIL TERM, 1914. AGENDA NO. 3.

JOHN D. WILSON, Appellee,	)	Filed Oct. 16, 1914.
vs.	)	APPEAL FROM MASON COUNTY CIRCUIT COURT.
City of Mason City, Appellant,	)	

190 I.A. 510

SCHOLFIELD J.

This was an action in case brought by John D. Wilson against the City of Mason City, Illinois, to recover damages for injuries to a building and the contents thereof, caused by the blowing over and falling upon the same of a fire alarm tower with an 800 pound bell on the top of it. There was a verdict and judgment against defendant for $300.07, to reverse which judgment the defendant has appealed to this court.

The declaration consists of two counts. The first in substance charges that the defendant did not construct the tower and attach it to the ground as to prevent it from falling on property of the plaintiff during an ordinary wind storm, of the kind of storm usually prevalent in that part of the country where the same is located, by means whereof and by reason of the said negligence of the defendant in failing to guy the tower by suitable and safe devices to hold it in position the bell tower fell on November 11, 1911, on the property of the plaintiff.

The second in substance alleges that the defendant constructed the tower of light material, grossly out of proportion by making the height of the tower so much greater than its width; that said tower was in fact a dangerous structure and was liable at any time during an ordinary wind storm which usually and customarily visited that section of the country when the wind was blowing from the south, east

or west to fall upon the plaintiff's property and that while an ordinary and usual current of air was passing by and over and against the tower, the air passing through the open windows and doors of said tower, being a part thereof, caused the same together with the force of air against the south side of the tower to turn over said tower toward the north and fall upon the brick building of plaintiff breaking through the roof and walls of building and damaging contents.

The only question raised is concerning the admission of expert testimony as to the propriety of the construction of the tower to prevent it from being blown over by wind or storm of the kind usually prevalent in that part of the country where the mishap occurred. One of the witnesses whose evidence was objected to was a contractor carpenter and builder in the city where the mishap occurred, the other was an architect.

Both of these witnesses were experts upon matters pertaining to their business and such structures as that involved in this case, and the propriety of construction and sufficiency of buildings is not within the knowledge of ordinary men 5 Ency. of Ev. 559-560.
It is insisted the questions answered by the experts was the ultimate question to be passed on by the jury and as not accurately stating the construction of the tower. While the questions asked are not strictly hypothetical that objection was not raised, but only that the questions were irrelevant and immaterial. The question purported to state the construction as shown by the evidence and no missing element or inaccuracy is pointed out either in the objection or in the argument in this court. While the storm may have been cyclonic and unusual, yet if the building had been properly constructed it might not have been blown over. If the building was not properly constructed and the plaintiff was thereby injured plaintiff was entitled to recover even though

the storm was unusual.

The tower was 16 feet square at the base and 8 feet square at the top and claimed by one side to be 52 feet high and 64 feet high by the other. The building was not anchored and the evidence of the architect was that proper construction required that such a building unanchored should not be higher than twice the width of the diameter of the base. It is a well established rule of law in this state that courts will not grant a new trial or reverse a judgment on error on account of the admission of improper or the rejection of proper evidence, or for giving improper instructions, if it appears from the entire record that justice has been done. Winnesheik vs. Schueller, 60 Ill. 473. We are satisfied from an examination of the entire record in this case that the evidence warrants the verdict and judgment and that justice has been done between the parties. The judgment will therefore be affirmed.

Affirmed.

April 7 –
1914 –

Guy Thilius.

J –

132

14

GENERAL NO. 6178 APRIL TERM, 1914. AGENDA NO. 6.

Filed Oct. 16 - 1914 -

County Court

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in error,
vs.
JOHN H. ONTEMAYER,
Plaintiff in Error.

ERROR TO MORGAN.

190 I.A. 514

SCHOLFIELD J.

The plaintiff in error was indicted by the Grand Jury of Morgan County, for selling intoxicating liquor within Anti-Saloon territory. The indictment contained five counts and was certified to the County Court for trial. A trial was had by a jury and plaintiff in error was convicted on the first and fifth counts.

The evidence was that the plaintiff in error was engaged in the drug business at Jacksonville, Illinois, and that he sold to a number of witnesses essence of ginger. The compound contained 93 per cent alcohol and 7 per cent ginger. Witnesses for the People testified that they bought the compound as a liquor to be used as a beverage. Plaintiff in error testified that the compound was poisonous in its state as sold and unsafe to use as a beverage and that he sold it for medicinal purposes only. Plaintiff in error was a druggist and had a right to sell proprietary medicines even though they contained alcohol, if sold in good faith and not as an evasion of the law.

For the people the court gave the following instructions.

No. 1. The court instructs the jury that if you believe from the evidence beyond a reasonable doubt, that the defendant sold what he called proprietary medicine in Jacksonville Precinct within eighteen months prior to the time of the finding of the indictment in this case and that such proprietary medicine

was in fact an intoxicating liquor you should find the defendant guilty, although you may further believe from the evidence that said proprietary medicine was made by a regular formula used by druggists.

No. 2. The court instructs the jury that if the jury believe from the evidence in this case that the defendant, Obermeyer sold in Jacksonville Precinct, within eighteen months prior to the finding of the indictment in this case, what he called ginger or essence of ginger, and that it was intoxicating liquor and made those drank who drank it, then in law the defendant would be guilty and you should so find by your verdict.

No. 11. The court instructs the jury that if you believe from the evidence beyond a reasonable doubt, that internal revenue stamps were issued by the United States to the defendant Obermeyer, as a retail dealer in liquors at the Precinct of Jacksonville, and at the time of the issuance thereof said Jacksonville Precinct was anti-saloon territory, then in law the issuance thereof is pri a facie evidence of sale of intoxicating liquors in said Jacksonville Precinct by the defendant Obermeyer.

No. 12. The court instructs the jury that if you believe from the evidence, beyond a reasonable doubt, that the defendant sold what he called ginger or essence of ginger and that you also believe that such ginger or essence of ginger is intoxicating liquor, then you should find the defendant guilty, if you believe beyond a reasonable doubt that it was sold by the defendant in Jacksonville Precinct while the same was anti-saloon territory, within eighteen months prior to the finding of the indictment in this case.

No. 14. The court instructs the jury that if you believe from all the evidence in this case, beyond a reasonable doubt, that the defendant used any shift or device within the Precinct

of Jacksonville for the sale or delivery of any intoxicating liquor, for the purpose of evading the law, then such shift or device is a violation of law the same as if he had sold and delivered such liquor without shift or device, and the jury should so find by their verdict.

The first four instructions are erroneous in that they all ignore the element of good faith on the part of the defendant. If the defendant sold the compound in good faith as a medicine and not as a shift or a device to evade the law he had a right to sell it although it contained a large percentage of alcohol, and the jury should have been properly instructed on that question. Under these instructions no matter how honest the purpose of a druggist in selling for medicinal purposes drugs containing alcohol he would be convicted.

The second instruction is also faulty in that it does not require the jury to find from the evidence beyond a reasonable doubt and concludes that in law the defendant would be guilty and you should so find by your verdict. A direction to find the defendant guilty should never be given except as the result of a finding, from the evidence beyond a reasonable doubt, of all the facts which are necessary to establish the defendant guilty. Hix vs. People 157 Ill. 383.
The last instruction above quoted is erroneous in that it assumes the defendant sold intoxicating liquor in anti-saloon territory.

For the error of the court in giving of the above quoted instructions the judgment is reversed and cause remanded for a new trial.

Reversed and Remanded

#10 -
April Term
1914 -

E. P. Brockhouse Co. J -

133

GENERAL NO. 6160 APRIL TERM, 1914. AGENDA NO. 66

Filed Oct. 16, 1914-

WILLIAM McILVRID, as Receiver of COCKBURN COMPANY, PLAINTIFF IN ERROR, vs. MURPHY AND WALSH, DEFENDANTS IN ERROR	ERROR TO TAZEWELL COUNTY

190 I.A. 515

SCHOLFIELD J.

The plaintiff in error, as receiver of Cockburn Company, a corporation, brought suit on a contract against the defendants in error to recover the price of three Areo pulverisers with combustion chambers alleged to have been sold and delivered by Cockburn Company to the defendants in error, and also to recover the market price of some extras furnished defendants in error for said machines. The contract sued on is as follows:

"Rec'd.

May 20th, 1912, Murphy & Walsh.

Pekin, Illinois, May 18th, 1912.

Cockburn Co. NewYork, N. Y.

Ship by freight.

Order No. 166 D

Job 7305.

In acknowledging this order refer to Number and Date, and state when Shipment will be made.

Direct to Murphy & Walsh.

Knox, Indiana

3 Areo Pulverisers with Combustion Chambers Price $2000.00 F.O.B. New York City, Terms 25% upon delivery. Balance of 75% sixty days after delivery. Two complete outfits to be shipped--ten days--third to be shipped within 30 days. These machines to be guaranteed to give results equal to fuel oil. Cost of operation to be 30%

less than fuel oil, basing cost of coal at $2.50 per ton F. O. B. Knox, Ind, and fuel oil two cents per gallon, F. O. B. Knox. Invoice must show NUMBER AND DATE OF THIS ORDER.

MURPHY & WALSH

Per MILES MURPHY.

Accepted,
Cockburn Co.,

By W. A. Evans,

May 18th,1912."

The declaration consisted of the common counts with a bill of particulars attached. The pleas were the general issue and a special plea with a bill of particulars attached. There was a verdict and judgment on the special plea for the defendants in error for $591.99. At the time of the trial, in support of the declaration the plaintiff in error offered the contract in writing as above set forth. Defendants in error objected to the offer as incompetent under the declaration. The objection was overruled and exception taken. The objection was made that the express contract in this case was not admissible under the common counts. Upon this ruling of the court the defendants in error have assigned cross errors.

The ruling of the court was right and the contract properly admitted. The contract shows the number and kind of machines ordered, the price to be paid for them, and when they were to be delivered. The evidence shows the goods were delivered as per the contract. Nothing remained to be done than except to pay for them. It has been repeatedly held in this state that when the terms of a special contract have been so far performed that nothing remains but a mere debt or duty to pay money then the amount due may be recovered under the common counts. If the contract remains executory the plaintiff must declare specially. McArthur Bros. Co. vs Whitney, 202 Ill. 527 Rubens vs. Hill, 213 Ill. 523.

It is insisted by defendants in error that because the contract contained a clause in which machines were guaranteed to give results equal to fuel oil that the burden of proof was on the plaintiff in error to show that the machines complied with the warranty before he could recover. The clause is an independent covenant and being an independent covenant is not a condition precedent. If it is violated the defendant in error has an action against the plaintiff in error for damages or can recoup for damages. Rubens v . Hill, supra. The errors assigned by the plaintiff in error are numerous but the only one we think of any importance is the denying the plaintiff in error's motion in arrest of judgment and the giving of the seventh and fourteenth instructions for defendant in error.

It is insisted by plaintiff in error that the defendant in error's special plea of set off is not a plea of set off and amounts to no more than a plea of ~~respondent~~ recoupment. And that under the plea the defendants in error were entitled to recover an affirmative judgment. The contentions of plaintiff in error are right. The plea is nothing more than a plea of recoupment and under that plea the defendants in error could only off set their damages. The plea does not aver that the amount due defendants in error exceeds the amount of damages claimed by plaintiff in error and offer to set off and allow to plaintiff in error his damages and ask for judgment for such excess. This is a necessary allegation in the plea and the motion in arrest of judgment should have been allowed. Under the plea the defendants in error were not entitled to recover a judgment. The court also erred in giving instructions seven and twelve on behalf of defendants in error. These instructions leave it to the jury to determine whether the machihes were accepted by defendants in error

and if they were not accepted to find the issues for the defendants in error. The evidence shows conclusively that they were accepted. They were delivered installed, operated, and $500 paid thereon. The acceptance was complete and that question is not involved. Defendants in errormust rely on the alleged breach of guaranty and cannot rescind the contract. The machines had some value and plaintiff in error should have been allowed as a credit whatever that value was. For the errors indicated the judgment is reversed and the cause remanded.

Reversed and Remanded.

April 7 –
1914 –
T. A. Green –
J –

131

Gen. No. 6193. April Term, 1914- Agenda No. 16-

Filed Oct. 16, 1914-

Harry C. Bunn., Appellant.,

VS. Appeal from Circuit Court

Nettie B.Smith, Appellee- McLean County.

190 I.A. 530

SCHOLFIELD, J.

This was an action of assumpsit brought by the appellant against appellee to recover thesum of $1800. , which appellant claims was due him from appellee, as a real estate broker's commission. The case was tried before a jury and at the close of the plaintiff's testimony the court , on motion of defendant , directed a verdict for defendant and denied plaintiff 's motion for a new trial. This is assigned as error by the appellant.

Appellee and her two brothers owned a store building on the public square in the city of Bloomington, Illinois. It was heavily encumbered. The first or ground floor was occupied by the Woolworth Company as tenant, a company with office at 282 Broadway, New York City, proprietors of a five and ten cent store and Mr. E.C. George was in charge of the store as manager.

In June , 1912, appellant called appellee by telephone and conversed with her as follows :- "I told her I had a customer who would pay $87,000. for the building: she said she couldn't accept it: she said brother had always told her it was worth $90,000. , and they ought to have it, she referred to Dudley, and she also said she wouldn 't feel right to take a less amount. I said if I can get a customer who will give you $90,000. will you sell? And she said she would, and I said all right". " After this telephone conversation appellant went to the office of Woolworth and Company in the building in question, and talked with the manager and from him procured the name of the Vice-President of that Company, to whom he wrote a letter.

He did nothing more and heard nothing from the letter until Mr. Smith from New York representing Woolworth and Company, called on him in August 1912. Appellant says that he talked for some time with Mr. Smith, of the Woolworth company, and that Mr. Smith finally made the remark; "I expect we will have to have this building, you get Miss Smith to come to the Woolworth store". He says he then went to look for appellee and that Mr. Smith went to the store. After Mr. Smith reached the store, the manager called in appellee and very soon appellant came in and says he had a conversation with appellee as follows;- He said "I spoke to her and said, I have been looking and telephoning for you", and she said, "I can sell to these people as well as you can. I didn't tell you to sell my building ". "I said don't you remember my offering you $87,000?" and she said "Yes and I refused it"- Didn't you tell me you would take $90,000. and you said yes"? But she said "My price is $90,000- and I won't give a commission" and I said "if you sell it to those people you will have to pay a commission". Some months later appelee and her brother sold the building to Woolworth and Company, and appellant brought suit, claiming that he had been employed as her broker to find a purchaser. This was practically all the evidence offered by the appellant.

The evidence fails to show any employment by the appellee of the appellant to sell her property. All it shows is that appellee said she would sell for $90,000. She did not request or solicit appellant's services. He called her up by telephone and told her he had a customer who would pay $87,000 for her building, she said she couldn't accept it. And appellant then asked her if he would get a customer who would pay $90,000. would she sell and she said she would. This in no way constituted an employment. It was simply an answer to his question and there was nothing in the answer or the conversation by which appellant could be misled in to believing he was employed to find a purchaser for the property, or that appellee would pay him a commission if

he did find one. The mere fact that he was instrumental in finding a purchaser who afterward bought the property of appellant at the price she told him she would take for it would not entitle him to a commission unless he could show he was employed by appellee to find the purchaser. This court has repeatedly held that before a broker can recover for his services he must show that he was employed.

We have carefully examined the authorities in appellant's brief and find nothing in them that changes the rule. The question of employment is not raised in them. The evidence fails to show any employment and the court was right in directing a verdict.

Judgment affirmed.

April Term
1914 –
C. D. Fryatt – J.

Gen. No. 6210. April Term, 1914- Ag. No. 30-

Filed Oct. 16, 1914-

Hayes Pump and Planter Company.,
Appellee.

VS. ; Appeal from McLean .

G.R.Lott and Harry M. Lott.,
Appellants-

190 I.A. 538

SCHOLFIELD, J.-

This is an action of assumpsit brought by the Hayes Pump and Planter Company appellee against G.R .Lott and Harry M.Lott appellants. The declaration consisted of the common counts with a sworn statement of the account sued on. To said declaration appellants filed a plea, and afterward an amended special plea therein pleading , in bar of the action, appellee 's contract with appellants, averring that in and by said contract appellee sold to appellants the planter and supplies in question and assigned to appellants certain territory for the trade season, that said contract was entire, that appellee had breached the territorial provisions of the contract, and that therefore it could not recover for the planter sold and delivered to appellants. Appellee demurred to said plea craving over of said contract. The court sustained the demurrer and appellants accepted and elected to stand by said amended plea. Judgment on demurrer was entered in the sum of $518.32 to reverse which judgment this appeal is prosecuted. The plea is wholly bad as it is a plea in bar of the action. The contract is not entire but severable. The agreement to pay for the goods sold and delivered thereunder is an independent agreement and the territorial provisions contained in the contract are not conditions prodedent to the agreement to pay for the goods sold and delivered. Appellants could have recovered under the general issue if that plea had been filed or they could have filed pleas of partial or total failure of consideration as the case might be or pleas of set off. The appellants having admitted the planters were sold and delivered to them, the mere fact that

appellee breached some provision of the contract would not be a bar to the recovery of some amount for the planters. The plea is bad as a plea in bar and the court rightfully sustained the demurrer thereto and there being no other plea on file, it was not error for the court to enter judgment for appellee for the amount sued for in the declaration. And the judgment must be affirmed.

A F F I R M E D.

Chapter I -
1914 -
C-8-Page 8 -

(141)

537

Gen. No. 6213- April Term, 1914- Ag. No. 33-

Filed Oct. 16, 1914-

Geo. E. Lewis and R.M. Scanlan,
for the use of Geo. E. Lewis.,
Plaintiffs in Error-

Dec. 2, 1914-

VS.

W.E.Rayburn.,
Defendant in Error-

R.H.Denied-

Error to McLean.

190 I.A. 539

SCHOLFIELD, J.

This is a suit upon a promissory note for $750.00 brought by plaintfffs in error against defendant in error. The plea is the general issue, with an agreement, that all evidence competent under any good plea which could be pleaded should be heard at the trial. A jury being waived ; the case was tried by the court and judgment rendered for the defendant. Before the argument of the case the plaintiffs in error offered to the court certain propositions of law to be marked held or refused. The George H: Paul Company was a corporation with its main office in Washington, Iowa and was engaged in selling land in Texas and other states. The plaintiffs in error were its agents and made what is called an earnest money contract with defendant Rayburn for the sale to him of 160 acres of Texas land for $5040., payable $1680 in hand at first payment, Rayburn agreeing to deliver vendor's lien notes for balance, 1/6 of whole due in one year 1/6 in two years and balance in five years with 6 per cent interest from March 30, 1909 the date of the contract. The $1680. was paid by the defendant giving to plaintiffs in error his note for $750., for their commission on the sale and a note to the George H. Paul Company for $930. due March 30th, 1910.

The contract contained a clause that if Rayburn shall fail to pay any part of the earnest money when due; then at the option of the George H. Paul Company this contract shall become null and void and all payments made herein shall be forfeited

as liquidated damages. The defendant Rayburn became a sub-agent for the George H. Paul Company under the plaintiffs in error and paid $685. On the ~~22d~~ $930 note by commission earned by him as sub-agent, and was given credit on the note for that sum. On December 27th- 1910 the George H. Paul Company forfeited the contract with the defendant in error Rayburn because the balance on the $930. note had not been paid. It does not appear that either abstract or deed was tendered by the George H. Paul Company to the defendant in error Rayburn before the forfeiture was declared.

Plaintiffs in error brought this suit on the 750. note after the forfeiture had been declared. When the $750. note was given the plaintiff in error told the defendant in error Rayburn that the George H. Paul Company was owing them the amount for which the $750. was given for commission on other sales and that the note was not for commission on this sale.

It is clear from the evidence that the $750. note of the ~~defe~~ defendant in error Rayburn was given the plaintiffs in error for commission on the sale by them to the defendant in error Rayburn. , and it is also clear from the evidence that the plaintiffs in error were not entitled to their commission from the George H. Paul Company until the cash payment had been made and the deed delivered. Plaintiffs in error stood in no better position than the George H.Paul Company when the George H.Paul Company forfeited the contract with defendant in error Rayburn, the George H.Paul Company could not collect anything further on the contract and the contract being forfeited the consideration for the note failed entirely. Plaintiffs in error were not innocent purchasers. They made the contract. Plaintiffs in error under their contract with the George H.Paul Company could not have ~~mk~~ collected the commission from the George H.Paul Company because it was not due and as they could not collect from the George H. Paul Company and the George H. Paul Company had forfeited the contract with the defendant in error Rayburn they cannot collect the note from him.

The propositions of law and fact refused by the court were properly refused for the reason there could be no recovery under the facts.

Judgment affirmed.

April Term
1914 —
43 —

C. D. Myers —
J —

142

GENERAL NO. 6220 APRIL TERM, 1914. AGENDA NO. 75.

ETTA L. HILL,
Appellee,
vs.
Harmon B. Hill,
Appellant,

Filed Oct. 16, 1914-
Nov. 6, 1914- R.H.Denied-
APPEAL FROM SANGAMON.

190 I.A. 541

SCHOLFIELD J.

This was a bill filed by appellee against appellant for separate maintenance. The bill alleges that the appellee was married to appellant on September 2, 1906; that she lived with him as his wife until about May 1st, 1913, when he abandoned her without fault on her part, that since said time he has refused and neglected to treat her as his wife; that on September 3rd, 1908, a male child was born to them, whose name is Glen Bernard Hill, who is still living; that he is now forcibly held and retained in the custody of appellant contrary to the wishes of appellee and contrary to a certain agreement entered into between them; and that appellant is an unfit person to have the care and custody of said infant son. The bill also alleges various acts of cruelty towards her on the part of appellant. The bill further alleges that appellant in December, 1912, induced her to sign and acknowledge a certain contract, by the terms of which appellee and appellant were to reside separate and apart and by which appellant binds himself to pay appellee upon the execution of the same the sum of $50.00 and thereafter on the 27th of each and every succeeding month, the said sum of $50 for the support and maintenance of appellee and by further provisions the care of the minor child Glen Bernard Hill was provided for. It is charged that such agreement was procured by means of fraud practiced by appellant. The bill further charges that appellant enjoys an income of from $5,000 to $10,000 a year and that the appellee has no means and that appellant failed to carry out the terms of his said agreement with her and that he forcibly took from her the said infant son Glen Bernard Hill. The prayer

of the bill is that appellant be required to pay appellee a sufficient sum of money to enable her to defray the costs and expenses of carrying on her suit against him, and that court find upon final decree that she was living separate and apart from appellant without her fault; that she be given the custody of the minor child and a sufficient sum of money to enable her to live according to her station in life, that said contract be set aside and that appellant be enjoined from taking said minor child out of the jurisdiction of the Circuit Court of Sangamon County.

The answer of appellant admits the marriage, birth of the child, and that said child is in the custody of the defendant; denies that he is living separate and apart from appellee without her fault and avers that appellee is living separate and apart from him by reason of her own wrongful and improper conduct; and that by reason of her own wrongful and improper conduct he entered into the agreement pleaded in her bill of complaint in December, 1912, under which agreement appellee was to reside separate and apart from him and was to receive from him the sum of $50 each month for her support and maintenance and was to have in her charge, subject to the supervision of appellant, the said infant child Glen Bernard Hill; denies that appellee was induced to enter into said contract by virtue of any fraudulent conduct or acts on his part, but avers that appellee entered into said contract voluntarily and with a full understanding of the terms and conditions thereof; denies that he has been guilty of improper conduct or cruel treatment with respect to appellee; denies that he is not a fit person to have the care and custody of the child and avers that appellee owing to her condition of health is not a fit person to have the care and custody of said child.

A decree was rendered finding that appellee had sustained the allegations of her bill and that she was livin separate and apart from appellant without her fault, and allowing

her separate maintenance, and the custody of the infant child and decreeing that she be paid the sum of $50 per month.

It is urged that the court erred in finding that appellee was living separate and apart without her own fault at the time of the filing of her bill of complaint.

The evidence in this case is voluminous and much of it irrelevant. We have examined it carefully and find it sufficient to sustain the finding of the Chancellor that appellee is living separate and apart from appellant without her own fault. The evidence introduced on behalf of appellee tended to show that she was married at the age of twenty-five years to appellant at Green City, Mo., on the 2nd day of September, 1906; that prior to her marriage she was a stenographer, but left her employment some time prior to her marriage, at his suggestion, to go home and take a rest; that at the time of the marriage appellant was cashier of a bank at a small salary; that they continued to reside in Green City for nearly two years, and during that time she had no serious sick spells with the exception of a miscarriage; that during their stay in Green City she again became pregnant and in April, 1908, appellant and appellee removed to Quincy, Ill. and resided in the same house with appellee's parents until September 2nd, when the child in question in this case was born. That during the time of pregnacy appellee was sick, suffered a great deal with her right ovary and after the birth of her baby was not strong for some time thereafter; that about two months after the baby was born, they removed to an apartment house, where appellee was provided with a servant for a short time; that some eight or nine months after the birth of the baby, appellee was operated on for leucorrhoea and laceration of the cervix; that there was a tear that had been occassioned during labor when the child was born, and the cervix was then amputated; that subsequently to this operation appellee suffered another miscarriage, and it then became necessary for her to submit to

another operation in which the uterous, one ovary, and both tubes were removed; that between these two operations, however, appellant and appellee removed to Springfield, and while there appellee was taken to a hospital and the operation of curetment was performed on her by one Dr. J. F. Kelly; that while in Quincy on a visit, the removal of the uterus above referred to was effected, and at the same time appellee developed a case of typhoid fever and was confined in the Quincy hospital for a period of seven weeks; that during the time they resided in Green City, appellant began to show a coldness towards appellee, talked unkindly about her, cursed her a number of times and pushed her over once; that during the time they lived in Quincy they had no serious domestic difficulty, although a number of times before the baby was born she complains that he swore at her, talked ugly to her and had very little patience with her; that after moving to Springfield a difficulty occurred while they were living in the Loper flats that arose over a misunderstanding in regard to her taking lunch up town one day; that in the argument following the episode he slapped her; that as a result of the misunderstanding appellant compelled appellee to apologize to his stenographer, which she first did over the telephone and afterward at the office in person; that afterward they took a trip to Denver together, leaving the baby with appellee's mother; that there were unpleasant feelings on the trip but no trouble; that after their return appellant's sister visited them for three or four weeks, during which time appellant was very cold towards her; that his mother came to visit and his coldness continued and an unpleasant scene ensued resulting in the mother and sister leaving the house; that the matter was later adjusted and they returned to the house to finish their visit; that things became so unpleasant at home that appellee went away for a few weeks; that while she was away he wrote to her that ifshe could not change her ways she could change her home, and if she could not

leave her temper there to stay and not come back; that one evening when they were getting ready to attend some show, he was walking up and down the hall in an angry manner arguing with appellee about a cousin of hers who wanted to come and board with her and to which he objected, in the course of which he struck her in the face, knocked her hat off, and pulled some rings off her hand; that next morning the subject was renewed and he slapped her again; that she then went to Mrs. Good's a neighbor in the same apartment building who saw the red marks on her face and who returned to appellee's flat and assisted in looking for the rings, finding one under the hall tree and another in the hall; that about this time appellant informed appellee that he had been advising with an attorney for several months; that appellee made some effort to consult an attorney but knew none in Springfield whom she could consult; that he informed her he wanted to make a settlement of some kind, and she asked what he would like to have her do; that he replied that he would like to get a nice little home for her some place, give her an allowance, that she should live there and have the child and he would come and visit them as he always had; that if they lived separate and apart for a year, then they could go back together again; that appellee then sent for her brother; that appellant had his attorney come down to the house on Christmas day to talk over the proposed contract which was afterwards drawn and submitted to appellee; that appellee's brother then took the contract to some attorney in Missouri, to whom he submitted it, and at which conference appellant's attorney was present but appellee was not, and it was subsequently returned to her; that she and appellant read it over together, no one else being present, that when she signed the contract that she was nervous and torn to pieces and did not realize what it contained; that she never saw it until she and appellant read it together; that she signed the contract in the presence of appellant's attorney and a Notary, that before the contract was signed, however, appellant said to her

"if you don't hurry and sign this I will tear it up" to which statement she replied by begging him to "let us tear the contract up and live together again"; that after the contract was signed appellee was moved into a flat known as one of the Wartel flats, about the middle of January; that with the exception of the piano which he sold on one occasion when she was away from home, hiss things were kept in the Bartel flat until about the middle of March; that appellant came to the flat occasionally to see the baby and by appellee's invitation stayed several nights with them, occupied the same room and bed with her and cohabited with her as her husband; that appellant permitted appellee to retain the custody of the child for some months after she moved into the Bartel flat; that she was called to her parents' bedside by their illness, expecting to remain two weeks; that appellant first objected to her taking the child but finally consented; that she was detained two weeks longer than she expected to be, calling appellant over the long distance telephone and receiving permission to remain the desired length of time; that she returned to Springfield about April first; that about this time he brought his mother and sister to Springfield and removed his part of the furniture from the Bartel flat, and began taking and keeping the child for two weeks at a time, at the end of two weeks bringing him back to her and that he would then leave the child with her for one week and would then come for him again; that this continued until June 21st, when he took the child for the last time and has never returned him; that appellee purchased nothing for the child on appellant's credit until after her return from the visit to her sick parents; that his night dresses had been left at appellant's residence and appellant directed appellee to purchase three or four for him and that she procured them at Herndon's store and charged them to appellant; that he afterwards telephoned her that the bill had been sent to him and that she was not to buy anything more for him, that when the child needed clothing to

direct him and he would do the buying; that she did not follow his instructions as she told him she did not think it necessarily had to be done that way, as the contract, as she understood it, did not so provide, and that he had never taken care or thought about selecting his clothes before then; that in the aggregate she purchased about ten dollars' worth of clothing for the baby, and nothing for herself, on his credit; that at one time she bought three pairs of stockings for the baby and ordered them delivered; that they did not come and upon inquiry at the store she learned that he had given orders not to deliver anything to her that was charged to him; that at one time appellant wrote appellee that he was coming for the child at a certain time; that before she received this letter she had made arrangements to take the child out somewhere, and so called appellant up on the telephone telling him that she had already made arrangements to take the child somewhere else at that particular time; that this was the only occasion on which he called for the child and did not obtain him; that appellant never permitted the child to stay with her the full two weeks which she believed she was entitled to him under the contract; that after appellant secured possession of the child he ceased making the $50 monthly payments provided for in the contract, because as he claims, she was not living up to its terms; that on several occasions appellee went to appellant and proposed that she return and live with him, stating that it was her desire so to do and that it never had been her desire to separate from him; that once she begged him to return and live with her, and he replied that he never expected to; that she stated during the progress of the hearing before the Chancellor that if he would make the proposition to take her back and live with her as her husband she certainly would accept it; that since the child was taken from her she had had little opportunity to see him and be with him; that she asked to have him for awhile on Thanksgiving and Christmas days, but was refused,

and appellant stated to her that he didn't intend to let the child out of his hands until the court decided it, and that she went out to appellant's house repeatedly, once just before Christmas taking some little Christmas things, and was not admitted nor permitted to see her own baby.

Appellant admits that after the trouble in the office, over appellee taking lunch up town x that after they went home he slapped her and his testimony corroborates appellee in many other instances. Appellant testifies that appellee complained a great deal of sickness and was high tempered and had a very nervous disposition and would have tantrums and for days afterwards would be as nervous as could be.

The parties had been married six years, and during that time the appellee had been pregant four times, which resulted in three miscarriages and one birth, and underwent two surgical operations necessitated by reason of the birth of their child. Is it any wonder that she was nervous and petulant. It was the duty of the appellant at those times to treat her with kindness and forbearance, but instead of that the evidence shows that his conduct towards her was cruel, unkind and shameful. The finding is fully warranted by the evidence.

It is next urged that the court erred in finding in the face of the contract of separation that he had jurisdiction of the subject matter of appellee's bill, and that she had a right, having fixed her own status to maintain the same. This was not error. Articles of separation making a provision for the wife should be upheld by a court of equity if it appeared that the agreement was fairly and voluntarily entered into, and was free from any sort of coercion, duress or fraud, and it should further appear that the provision for the wife was fair and equitable in view of the property of the husband, the needs of the wife, and their station in life, Bailey v. Bailey, 157 Ill. App. 74. While there was no express fraud practiced on appellee, still

the contract was executed by her under a misapprehension of its terms and meaning while she was in a very nervous excitable condition of mind brought about by the cruel and unkind treatment of appellant to her. The contract recites that appellee has no statutory grounds for divorce or separate maintenance and expressly disclaims any course of misconduct on the part of appellant; provides for the payment to the appellee of the sum of $50 per month for her support, the same to be in full of all her claim and rights to support from appellant, and gives appellee certain household goods and furniture. It provided that all the engagements undertaken by appellant in the agreement depend upon the residence of appellee in the City of Springfield during the life of the contract. It provides that while the appellant does not to the least extent waive any of his legal or natural rights, to the custody, control support, and the right to direct the education of his said infant son, the said Glen Bernard Hill, yet the appellant agrees that during the life of this contract the said Glen Bernard Hill may take up his residence and remain with the appellee so long as such arrangement with reference to the residence of the said Glen Bernard Hill shall appear to be for his best welfare, and during the life of this contract, stipulates that in various matters the appellant agrees to consult with appellee and be guided and influenced and to act upon her suggestion whenever it appears to be wise and expedient exercising good judgment for the future of their son; provides that appellant shall have the right at such times as he desires to take his said son on trips or visits on no occasion to exceed the period of two weeks without the consent of appellee, and that appellee in turn shall give to appellant due and timely notice of such visits on her part with said son, on no occasion to extend beyond the period of two weeks without appellant's consent. The contract also provides that it shall remain in force and binding on the parties until such time as there shall be a breach or violation

of the terms thereof, by either one or both parties or until the terms thereof shall be modified or enlarged by the mutual consent of both of said parties.

While the contract apparently gives the control and custody of the child to appellee, it leaves it absolutely in the control of appellant. It is clear from the evidence that the only consideration for appellee entering into the contract was her understanding and belief that she was to have the custody of her child and that she and her husband might resume marital relations. The contract is unfair and inequitable to appellee. Appellant breached the contract by refusing to make the payment of $50. a month to appellee for her support. By the terms of the contract that was a termination and an abandonment of the same by him and left the court free to act as he saw fit. The decree was right in finding that the court had jurisdiction of the subject matter of appellee's bill and that she had a right to maintain the same.

It is next urged that the trial court erred in finding that appellant should pay, and in ordering him to pay appellee the sum of $50. per month. This was not error. It was admitted that appellant enjoys an income of $250 per month. Fixing the amount of the alimony rests in the sound discretion of the court, having reference to the conditions of the parties in life and th circumstances of the case. Johnson vs. Johnson, 125 Ill. 510. There was no abuse of that discretion in this case in fixing the amount and no error in ordering it paid.

It is next urged that the court erred in finding that it would be for the best interests of said infant son, Glen Bernard Hill, that appellee have his custody, care and control. The court acted within its power and the evidence fully warrants the finding.

It is next urged that the court erred in finding that the equities were with the appellee and that the appellant should pay the costs of the proceeding. The evidence fully sustains the finding. The decree was fully warranted by the evidence and is affirmed.

Affirmed.

April 5 [illegible]

1914 –

50 –

J. G. Creighton

J

144

GENERAL NO. 6227 APRIL TERM, 1914. AGENDA NO. 69.

HONORA GOGHERTY,
APPELLEE
VS.
CITY OF DECATUR,
APPELLANT

Filed Oct. 16, 1914-

APPEAL FROM MACON

190 I.A. 548

SCHOLFIELD J.

Appellee recovered a judgment in the Circuit Court against the appellant for $2000 for damages to her real estate caused by the lowering of the street in front of her property by appellant to make an underground railroad crossing.

The declaration was in three counts. The first count in substance alleged that the City of Decatur made "large excavations and did cut out of said street and dig up the same with scrapers, spades and shovels, and other implements, so that the street is cut down from its original grade, to-wit, sixteen feet, immediately in front of and contiguous to plaintiff's premises on said North Jasper street, for the purpose of a subway under the tracks of a certain railway therein situate" The declaration further charges that the plaintiff's property and buildings have been much injured and damaged and the rental value thereof much impaired and lessened, and that by reason and in consequence ~~of~~ thereof, the market value of plaintiff's said property has been and is injured and is much depreciated, all caused and occasioned by the said defendant's and that such depreciation is special to said premises, and that by means thereof plaintiff's premises have become particularly worthless and of lessened value to her.

The second count alleged that plaintiff was entitled to the peaceable enjoyment of her property, etc., without said premises being damaged or injured by the wrongful or illegal acts upon the part of the defendant which permanently and specially

depreciated the value of said premises; and further alleged that an excavation was made which lowered the grade or surface in front of plaintiff's premises on Jasper street, to-wit; sixteen feet extending northward and southward one hundred feet in each direction, and by the same thereof, the right of egress from Jasper street to and from plaintiff's premises was cut off and totally destroyed, and that she sustained special damage, etc.

The third count of the declaration was a complete description of the premises, the change of grade, and stated that the plaintiff's property had been specially and permanently damaged and that all of these acts were without the consent of the plaintiff. A general demurrer to the declaration being overruled the appellant filed a plea of not guilty.

The appellant first insists that the action was prematurely begun. Suit was begun before the work was completed but it was substantially finished in front of appellee's premises. The work did not have to be completed before the action could be brought. They had appellant's ordinance and plans if any change was to be made which would have lessened the damages appellant could have offered to show the change. Starr and Crescent Mill Co. vs. Sanitary Dist. Chicago, 120 App. 555. Where a street has been cut down and access to it destroyed, and damages have resulted to the property adjoining, the right of action for the injury to the property is complete. City of Joliet vs. Blower, 49 Ill. App. 464 inferentially 155 Ill. 414. The work having been substantially completed in front of appellee's premises and had progressed to such an extent as to obstruct ingress and egress from the property to the street at the time the suit was commenced, the suit was not prematurely brought.

It is next urged by appellant that the court erred in permitting the jury to view the premises. The question of permitting the jury to view the premises rests in the sound discretion of the court and there was no error in the court

permitting them to view the premises Rich vs. City of Chicago, 187 Ill. 396. Springer vs. City of Chicago, 135 Ill. 566. The jury were instructed that the view was not evidence.

It is also urged by appellant that the court erred in permitting witnesses to testify as to the value of the property without qualifying. The witnesses stated that they were acquainted with the situation and location of the property in question and in a general way were acquainted with the value of ~~the~~ real estate in Decatur and in that part of the City where the property was located. All persons who are acquainted with property, and have opinions of its value may give their opinions to the jury, together with their knowledge of the property and the facts upon which the opinions are based, C. & W. I. R. R. Co. vs. Heidenreich, 254 Ill. 231. The qualifaction of witnesses is a question for the court in the first instance, but the weight to be given their opinions is to be determined by the jury, from the knowledge and experience of the witnesses, and their capacity to form a judgment. The witnesses were properly qualified and the court did not err in permitting them to testify as to the value of the property.

It is also urged that the court during the progress of the trial made improper remarks in the presence of the jury prejudicial to appellant. While some of the remarks objected to might have been improper we fail to see wherein they in any way affected the verdict.

We find no reversible error in the giving or refusing of instructions. The judgment is justified by the preponderance of the evidence. We find no error in the ruling of the court that justifies us in reversing the case and the judgment will be affirmed.

Affirmed.

April 7 —
1914 —

W. C. Johnes —
J —

147

Gen. No. 6241. April Term, 1914- Ag. No. 48-

Filed Oct. 16, 1914-

Elijah Anderson and John W. Anderson,
Appellees.,

VS. ; Appeal from McLean County Court-

A.P.Benjamin.,
Appellant.

190 I.A. 558

SCHOLFIELD J.

This was a suit commenced before a Justice of the Peace by appellees against appellant to recover damages occasioned by the failure of the appellant to deliver to appellees a certain quantity of hay which they claim they bought of him. Judgment was taken by default before the Justice of the Peace and appellant appealed to the County Court where a trial was had by a jury and verdict rendered for appellees for the sum of Fifty Dollars on which judgment was entered and appellant appealed to this court.

Appellees were engaged in buying and selling hay in the city of Bloomington. About the middle of March 1911, appellant called appellee Elijah Anderson by telephone and told him he had some hay to sell and wanted him to come out and look at it. Anderson went out in a day or two. The hay was stored in a hay barn about one half mile East of appellant's home. After looking at the hay Anderson asked appellant what he wanted for it and appellant told him Ten Dollars a ton and you haul the hay: Anderson said "I can't use it loose and will pay you more money for it baled".

It was finally agreed that appellant was to have Eleven Dollars per ton for the hay he would have to sell if he could get his son to bale it. They then went up to the house and looked at a ton of old hay that was already baled, and Anderson bought that and

later sent his son after it. Later in the season appellant sold the hay in its loose condition to another party. Appellee never made any demand for the hay or any offer to pay.

The evidence in its most favorable light to appellee fails to show a completed contract of sale. No time was fixed for delivery or payment. All appellant did was to agree to sell the hay at Eleven Dollars per ton, provided he could get his son to bale it. The hay was never baled and the evidence does not show that appellee ever made any demand for it, or any offer to pay for it. Where the contract is silent time of payment and delivery are concurrent.

Metz vs. Albrecht, 52 Ill., 491- Hough vs. Rawson, 17 Ill., 578-

No agreement or contract was established and the court should have given the appellant peremptory instructions, and for the failure to do so the case will be reversed without remanding.

Reversed.

14-14 Dec 02

149

GENERAL NO. 6248 APRIL TERM, 1914. AGENDA NO. 54

Filed Oct. 16, 1914.

MAGGIE M. HIDDEN,
APPELLEE

vs.

WILLIAM K. BAKER JR.
APPELLANT.

APPEAL FROM MOULTRIE

190 I.A. 561

SCHOLFIELD J.

This is a suit brought by the appellee against the appellant to recover damages for injuries suffered by her as a result of a conspiracy entered into by the appellant with others named in the declaration to commit a criminal assault upon her. The appellant alone was sued. The plea was the general issue. The case was tried by a jury which returned a verdict in favor of the appellee and against the appellant for $1000. Judgment was entered on the verdict and the appellant appealed.

The errors assigned are the rulings of the court as to the admission and rejection of evidence, the giving and refusing of instructions and that the damages are excessive.

The appellant with his brother J. C. Baker, one Guy Harp and Loren Batson on the night of the 5th of August 1913 had been to Sullivan, Illinois, where they obtained some intoxicating liquor. After drinking and carousing around Sullivan until nearly midnight they took with them a large quantity of beer in bottles, and all got into a one-seated buggy, with a gray horse hitched to it, and proceeded south from Sullivan, along the public highway until they arrived opposite the farm residence occupied by appellee and her husband; this was between twelve o'clock midnight and one o'clock A. M. It was arranged between said individuals that three of them should remain at the buggy and the fourth one, the appellant, should go to the house of appellee and her husband and this was accordingly done. Then the parties remaining at the buggy called out loud for appellee's husband and the third call awakened him

and he answered them and asked who it was. He was informed that it was J. C. Appellee's husband was acquainted with a young man by the name of J. C. Baker commonly called Collie Baker, and he being a married man and a relative of a person for whom appellee's husband had previously worked as a farm hand, the husband of appellee called to him and wanted to know what he wanted. The answer came back that he wanted him to come out to the road. Appellee's husband replied to him that if he wanted to see him to come to the house but the voice came back that he wanted to see him out at the road and for him to come down. Appellee's husband believing that he wanted to see him about some threshing work, he dressed and went out to the road. The house occupied by appellee and her husband was some three or four hundred yards back east of the public highway. When appellee's husband got out to the highway, he inquired what was wanted and those boys said they wanted to give him some beer. He informed them he did not want any beer, but they insisted they wanted him to drink some and produced a bottle for him, which after some parleying said husband drank. Then said boys engaged in other conversations, the purpose of which seemed to be to hold the attention of appellee's husband. They asked him to drink more beer; finally they said they would whip him if he didn't drink another bottle, then they engaged in other talk not of a particularly modest nature. Then Harp said "Let's tell him about being at Peoria." he said "maybe we can interest him that way." About this time appellee's husband heard a scream from his wife at the house and he started and ran to the house. When he started to leave the buggy and go to the house the boys in the buggy whistled. This was evidently intended by said boys as a signal to appellant.

Baker, the appellant, when he saw the husband leave the house, entered the house. The wife was sleeping in the west room up stairs, and when her husband left the house she arose from her bed and lighted the lamp in her bedroom. Appellant slipped up stairs in his sock feet, edged himself through the doorway into

the bed-room pulling his coat over the side of his face so that she could not see his face, and blew out the lamp and made an assault upon her in the bed. She screamed and jumped from the bed, but as she jumped he caught her and she says he caught her gown in his hands. She made her way to the doorway of her bedroom and down stairs, screaming at the top of her voice, and frightened almost to death. When her husband got to the house he found her downstairs in a dark room screaming at the top of her voice. Soon after appellee's husband entered the house appellant broke the screen off of the window upstairs, jumped out on the platform in front of the front door of house, stepped down at the edge of the porch, and ran towards the buggy in the road. He broke the front yard gate down as he ran, and afterwards stated to N. E. Gladville a disinterested witness that he ran ziezag in order to keep from being shot. When he reached the public highway, he got into the buggy with his confederates and they all drove South on the public highway as fast as the horse could run.

Mrs. Hidden the appellee, states that appellant did not have any shoes on when he came upstairs into her room. The next morning when daylight came the husband of appellee found one of appellants shoes at the edge of the front porch near the place where he had seen appellant stooping after he had jumped out of the front window. He also found a lead pencil at the other side of the porch that was not there prior to Baker's intrusion.

The next day appellee's husband saw appellant at Sullivan and he confessed that it was him that was in the house the night before, and he wanted to know what was going to be done about it. Appellee's husband replied that he would do what he could. Baker told appellee's husband that they were all drunk that night, and that they had a large number of bottles of beer with them and when asked by appellee's husband what he went to the house for, appellant replied he wanted to scare him. When asked why he went into the house to scare him when he knew that appellee's husband was out on the road, he made an evasive and unsatisfactory answer.

It was shown on the trial that appellant was a married man twenty-six years of age, and is a nephew of Fred Baker for whom appellee's husband used to work; that Mrs. Hidden and her husband had been married for three years, and that she was not at all acquainted with appellant, and did not know him.

Counsel for appellant admits his guilt, and in no way attempts to justify it, but insists that the damages are excessive, that no actual damages were proven, and that exemplary damages cannot be given unless actual damages are proven, and cites a large number of cases in support of said proposition. The cases cited are cases of negligence where there was no wanton malicious and wilful motive in commiting a trespass. In the case at bar the act of the appellant being wilful and wanton the rule of law is entirely different. Where the assault is wilful and wanton it is not necessary to prove actual damages before you can recover examplary damages, but in this case actual damages were proven. Courts will rather encourage the allowance of exemplary damages where the acts of the defendant are wanton and malicious, and in this case the assault was wanton and malicious and the result of a conspiracy.
We find no reversible error in the admission or rejection of evidence in this case or in the giving or refusing of instructions. In a case of this character no technical errors should reverse. The character of the offense was cruel, cowardly, and atrocious, and the verdict is fully warranted.

Judgment Affirmed.

April 7 –

1914 –

H G

Cochran

J –

130

GENERAL NO. 6254 APRIL TERM, 1914. AGENDA NO. 72.

Filed Oct. 16, 1914-

W. D. SMIDT,
DEFENDANT IN ERROR
vs.
J. C. DUBOIS,
PLAINTIFF IN ERROR

~~APPEAL FROM~~ DEWITT.

Error to Co-Court of

190 I.A. 563

SCHOLFIELD J.

This was an action of assumpsit brought by the defendant in error against the plaintiff in error for $1000 claimed to be due on open account for sawing lumber and hauling.

The declaration consisted of the common counts. The plea was the general issue. There was a verdict and judgment for the defendant in error for $545.95. The evidence was in direct conflict. The defendant in error testified that about the last of February or first of March, 1909, he made a verbal agreement with plaintiff in error to saw lumber at the rate of $7.50 per thousand feet if plaintiff in error cut and hauled the logs, and $10.50 per thousand feet if he himself cut and hauled the logs; that during the spring summer and fall of 1909 he sawed about one hundred thousand feet of lumber, from logs cut and hauled by plaintiff in error, and about twelve thousand feet from logs cut and hauled by himself. He also testified that he did some hauling amounting to $15. which had not been paid. Plaintiff in error testified that the sawing was to be done for $6. per thousand and that there was only about 16,500 feet sawed and that defendant in error had drawn money from him from time to time and was over drawn most of the time and he owed him nothing. Defendant in error denies this and states that no cash was paid him but he received between $80 and $90 in checks and orders.

Upon the trial of the cause the defendant in error was permitted over the objection of plaintiff in error to introduce his account book as testi ony to prove his claim. It is urged by the plaintiff in error that this was error. Defendant in error testified that the entries were true and just and were made each day at the mill on a board as the sawing was done and each evening were transferred on the book. We think the book was properly admitted in evddence. Christholm vs. Beaman Machine Co. 160 Ill. 101. Ryan Car Co. vs. Gardner, 154 Ill. App. 565.

It is urged that the trial court erred in not permitting the witness Campbell to testify. The court had entered a rule excluding witnesses. Campbell violated the rule and entered the court room and heard the testimony of defendant in error and part of the testimony of witness Anger. Ordinarily the party complaining should not be deprived of a witnesses testimony because he has violated the rule. The witness should be punished for contempt. We think, however, the court did not commit reversible error in refusing to permit the witness to testify, because the offer of the evidence which Campbell would testify was in regard to a written schedule. The schedule itself was the best evidence. The failure to produce which was not accounted for and for this reason the evidence was properly excluded. The action of the trial court in refusing to allow a witness to testify after he has violated the rule as to exclusion will not be reversed on appeal unless there is manifest abuse of the discretion. There was no abuse of the discretion in this case. Palmer v. People 95 Ill. 394.

It is also urged by plaintiff in error that the trial court erred in limiting the number of plaintiff in error's counsel. At the close of the examination of the jury attorney John Fuller appeared in the case as additional counsel for the plaintiff in error, whereupon the following remarks were made by the court. "I think if there was to be another counsel in the

case there should have been notice given; it should have been known last night. "You know how it is, you will want to examine the jury in relation to Mr. Fuller". "Mr. Mitchell there is no objection on the part of the counsel for plaintiff only that we wish to re-examine the jury as to Mr. Fuller, "Mr. Gray I never was aware of such an objectionbefore." The court, "because of the fact that the defendant did not get his lawyer in here before the jury was sworn there will be no other counsel appear in this case. I do not propose to waste time examining this jury again. If Mr. Dubois wanted another a lawyer he should have gotten him in here before this. Go ahead with your statement gentlemen. These remarks should not have been made in the presence of the jury. However, we do not think that these remarks in any way affected the jury in reaching their verdict or that they were prejudicial to plaintiff in error. A further examination of the record shows that notwithstanding these remarks Mr. Fuller remained in the case and made the offer to examine the witness Campbell, and made the offer of what Campbell would testify to. An objection was made by defendant in error at that time to him appearing in the case and the court refused to rule on the question and Fuller remained in the case. Plaintiff in error was ably represented by other counsel in the case.

It is urged that the court erred in giving the following instructions for the defendant in error.

1. The Court instructs the jury that under the law a person may testify to his account book, and that the same is the book original entries, and that it was made by himself and is true and just; that the proof of such facts entitles such account book to be offered in evidence.

2. The court instructs the jury that a person has a right to make entries upon a slate or board or slip of paper and afterwards transcribe it upon his original book of entries

provided said transcription took place at or about the time said entry was made on slate or board or slip of paper.

3. The court instructs the jury that the book offered in evidence should consider it as evidence in this cause and give it such weight as you think it is justly entitled under all the facts and circumstances of the case.

4. The court instructs the jury that all the plaintiff is required to prove is to prove his case by a preponderance of the testi ony, and if you believe from the evidence that the said J. C. DuBois employed the plaintiff to saw logs for him and agreed to pay him seven dollars and fifty cents ($7.50) per thousand for all logs sawed, which DuBois should haul, and ten dollars and fifty cents ($10.50) per thousand for all logs which the said Smidt should cut and haul, and you should allow the plaintiff for the number thousand feet sawed by him at above price, provided the preponderance of the evidence shows that said sawing was done and the contract was made for said price.

5. The court instructs the jury that a person has a right to bring a suit on account within five years after the account accrues due and the jury have no right to consider any reason which the plaintiff might have for putting off the bringing of the suit.

Instructions one, two, and three, are bad for the reason that they single out the book account of the defendant in error and prominently call the attention of the jurors thereto. Instructions of this character have frequently been condemned by this court.

Instruction number four is bad in that it eliminates the question of payment as a defense from the consideration of the jury.

Instruction number six is bad in that it takes away from the plaintiff in error the benefit of all circumstances proven which would indicate payment.

Where the evidence is in direct conflict the jury should be accurately instructed as to the law. For the reasons above indicated the judgment of the County Court will be reversed and the cause remanded.

Reversed and Remanded.

April 7 -
1914 -

Fred C. Hill
Co - J -

Gen. No. 6257- April Term, 1914- Ag. No. 73-

Filed Oct. 16, 1914-

John C. Hoxsey,
Appellant.,

VS. ; Appeal from Macoupin.

St. Louis & Springfield Ry. Co.,
Appellee.

190 I.A. 565

Opinion- Per Curiam-

This appeal brings before this court for review the ruling of the circuit court of Macoupin county on a demurrer to a plea of the Statute of limitations to an amended declaration and the entry of judgment that plaintiff take nothing by his suit.

On the first trial of the cause the plaintiff recovered a judgment, which was reversed and the cause remanded on an appeal to this court because the declaration did not state a cause of action and was insufficient to support a judgment even after verdict. Hoxsey vs. St. Louis & Springfield Ry Co., 171 Ill. App. 109. The original declaration on which the case was first tried contains one count and is set forth in substance in the former opinion.

After the cause was reinstated in that court plaintiff on September 24, 1912, which was more than two years subsequent to the time he was injured, amended the declaration, by leave of court by inserting therein the averments , that electricity which was the motive power by which defendant moved its cars was applied on said cars by means of moveable trolley poles attached to said cars extending from the cars to the trolley wire and moving under said wire when in proper position; that the telephone wires of the Girard Telephone Company were attached to the poles of the defendant; that there was no trolley guard or other device to prevent the telephone wires of the telephone company, so attached to the poles of defendant, from falling upon said trolley wire and so becoming charged with a dangerous voltage of electricity, if the same should become loose and broken; that a

trolley pole on a car of defendant while approaching said telephone wires jumped and slipped from under said trolley wire and sprang up against certain of said telephone wires and the same then and there were broken and fell against said trolley wire and so became charged with a dangerous voltage of electricity etc. To the declaration as amended defendant filed a plea of the general issue and a plea of the statute of limitation. The latter plea avers that the cause of action in said amended declaration is a new and different cause of action from that described in the original declaration, and that the cause of action in the amended declaration accrued to plaintiff, if at all, more than two years prior to the filing of the amended declaration. The plaintiff filed a demurrer to the plea of the statute of limitation, which was overruled, and the plaintiff standing by his demurrer, judgment was rendered against him.

The opinion in this case in the first appeal, on questions of law involved, cannot be reviewed and is binding on the parties and this court on this appeal. Reed vs. West, 70 Ill. 479; Jackson vs. Gloss, 249 Ill. 388; Prentice vs. Crane, 240 Ill., 250.

A declaration must aver sufficient facts from which the law will raise a duty owing from the defendant to the plaintiff and the failure of the defendant to perform that duty. McAndrews vs. C.L.S. & E. RY. Co., 222, Ill. 232. The original opinion after a review of the declaration states that;- "This declaration does not aver any facts from which the law will raise a duty owed from defendant to the plaintiff, or any neglect by defendant to perform any duty owed by it to the plaintiff, nor is there any proof in the record that will supply or cure the omission to make the necessary averments in the declaration, and it clearly falls within the rule stated in the above cases and is therefore insufficient to sustain a judgment even after verdict".

The amended declaration avers that there was no trolley wire

guard to prevent the telephone wire when broken from coming in contact with the trolley wire and that the trolley pole became detached from the trolley wire and broke the telephone wire, whereby the telephone wire came in contact with the trolley wire and was charged with a dangerous voltage of electricity. The original declaration contains no statement or intimation of such facts averred in the amended declaration.

A personal injury suit must be started within two years after the occurrence of the accident causing the injury or it is barred by the statute of limitations. Where the suit is brought within the prescribed time, and a declaration filed which does not state a good cause of action, and an amended declaration is filed which for the first time states a good cause of action, or states a new and different cause of action, the suit is regarded as begun when the amended declaration is filed and if more than two years have elapsed since the receipt of the injury, a plea of the statute presents a good defence. McAndrews vs. C.L.S. & E.RY.Co.(Supra.); Klawiter vs. Jones, 219 Ill., 626.

The original declaration having been held not to state a cause of action, the amended declaration filed more than two years after the accident and stating a new and different cause of action is subject to the defence of the statute of limitations. There was no error in overruling the demurrer to the plea.

The judgment is affirmed-

A F F I R M E D .

Fig. 4. Cross section.

Appellant modified opinion filed Oct 28, 1914

A 567

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

152

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

190 I.A. 567

ERROR TO
~~**APPEAL FROM**~~

Wright

vs.

No. 19

October Term, 1913.

Chicago-Herrin Coal Co.

Circuit **COURT**

Williamson **COUNTY**

TRIAL JUDGE

Hon. R. D. Farrand

Term No. 19. Agenda No. 63.

October Term, A. D. 1913.

Roley Wright, Defendant in Error, vs. Chicago-Herrin Coal Company, a Corporation, Plaintiff in Error.	Error to the Circuit Court of Williamson County.

McBride, P.J.

In a trial had in the Circuit Court of Williamson County, the plaintiff recovered a judgment against the defendant for five hundred dollars, which it is sought by this appeal to reverse.

The declaration alleges that between the first day of January, 1907, and the commencement of this suit that defendant mined and removed large quantities of coal, towit, five thousand tons, from beneath the land owned by plaintiff. To this declaration the defendant filed the plea of not guilty and also a special plea making a tender for the wrongs done in the amount of $42.35. A trial was had and at the conclusion thereof the following special findings were submitted to the jury for its determination: 1st.-What amount of coal, if any, defendant mined and removed from plaintiff's land? To which the jury answered, "One thousand tons." 2nd. - What was a fair cash market value of the coal at the top of the defendant's mine, where the market price of coal was determined at the time the coal was mined and removed from plaintiff's land? To which answer was made, "Ninety-five cents per ton." 3rd.- What was the total cost of transportation per ton for moving and transporting the coal from the place where it was mined down from the solid vein of coal on plaintiff's premises to the top of shaft of de-

Term No. 19. Agenda No. 63.

October Term, A. D. 1913.

Kelly, Trigg,

Defendant in Error,

vs.

Colonge-Herrin Coal Company,
a Corporation,
Plaintiff in Error.

Error to the
Circuit Court of
Williamson County.

McBride, P.J.

In a trial had in the Circuit Court of Williamson County, the plaintiff recovered a judgment against the defendant for $ five hundred dollars, which it is sought by this appeal to reverse.

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fendant's mine, where the market price was determined? To which answer was made, "Forty-five cents per ton."

Counsel for appellant complain that the special findings and verdict of the jury is not sustained in two respects, one of which is that the cost of transporting the coal from where it was mined to the place where the market value was determined was too low. It will be observed that the fair cash market value fixed by the jury on board the cars was ninety-five cents per ton, and transportation forty-five cents per ton, which left the value of the coal, when shot down, fifty cents per ton. The testimony of the witnesses for defendant in error tends to show that the actual cost of transportation of the coal was forty-four cents, while the testimony of plaintiff in error is, that many elements in the expense of transportation were not considered by defendant's in error witnesses, and he contends that the actual cost of transportation is sixty-seven and four tenths cents per ton. In this particular case we do not deem it necessary to determine whether the jury took into consideration all of the necessary elements of transportation or not as it will be observed that the plaintiff in erroin this case made a tender of fifty cents per ton as the value of the coal when shot down, and the testimony of the witnesses of plaintiff in error shows that they stood ready and willing to pay the plaintiff fifty cents per ton, so that we think the jury were in this case at least warranted in finding the value of the coal when shot down to be fifty cents per ton.

The next contention of plaintiff in error is that the special finding of the jury that one thousand tons had been taken and removed from plaintiff's land, and the verdict based upon this finding, was manifestly against the weight of the evidence. We are of the opinion that this special finding and the verdict is not sustained by the evidence in this case. It appears from the evidence that when defendant in error concluded that plaintiffin error had been mining and removing coal from under his land he

fendant's mine, where the market price was determined? To which answer was made, "Forty-five cents per ton."

Counsel for appellant complain that the special findings and verdict of the jury is not sustained in two respects, one of which is that the cost of transporting the coal from where it was mined to the place where the market value was determined was too low. It will be observed that the fair cash market value fixed by the jury on board the cars was ninety-five cents per ton, and transportation forty-five cents per ton, which left the value of the coal, when shot down, fifty cents per ton. The testimony of the witnesses for defendant in error tends to show that the actual cost of transportation of the coal was forty-four cents, while the testimony of plaintiff in error is, that many elements in the expense of transportation were not considered by defendant's in error witnesses, and he contends that the actual cost of transportation is sixty-seven and four tenths cents per ton. In this particular case we do not deem it necessary to determine whether the jury took into consideration all of the necessary elements of transportation or not as it will be observed that the plaintiff in error in this case made a tender of fifty cents per ton as the value of the coal when shot down, and the testimony of the witnesses of plaintiff in error shows that they stood ready and willing to pay the plaintiff fifty cents per ton, so that we think the jury were in this case at least warranted in finding the value of the coal when shot down to be fifty cents per ton.

The next contention of plaintiff in error is that the special finding of the jury that one thousand tons had been taken and removed from plaintiff's land, and the verdict based upon this finding, was manifestly against the weight of the evidence. We are of the opinion that this special finding and the verdict is not sustained by the evidence in this case. It appears from the evidence that when defendant in error commenced that plaintiff in error had been mining and removing coal from under his land he

obtained permission to have a survey made for the purpose of determining what amount, if any, had been removed by the plaintiff in error and employed F. B. Wilson, City engineer of Marion, Illinois, with C. A. Stanley, another civil and mining engineer, to assist him and they made a survey. Shortly thereafter the plaintiff in error secured the services of Ralph Rollo, a civil engineer of Murphysboro, Illinois, to make this survey. It appears from the evidence that Mr. Rollo was a specialist in mining engineering and had been employed by many mines in that vicinity in the performance of such work. That Mr. Rollo made his survey after Wilson and Stanley had made their survey for defendant in error and while Wilson and Stanley found that the premises of plaintiff had been trespassed upon, Mr. Rollo found that they had not, and thereupon the three engineers got together and determined to review the work of surveying and make a joint survey and ascertain wherein the discrepancy existed between the two surveys and determine if either one of them was correct. It further appears from the evidence that these men were equipped with the modern improved instruments for surveying in mines and that the instrument used by them was a transit of the latest improved pattern, and in the use of this instrument it was testified, by the witnesses, that they did not encounter the difficulties that were liable to arise in the use of instruments used for surveying where they had to depend more or less upon the needle. It further appears that in the making of this joint survey that the former surveys were carefully checked and it was ascertained by these men on the joint survey, which we think clearly appears to be the accurate survey, that they found that only eighty-four and seven-tenths tons of coal had been removed from beneath defendant's in error land. When the result of this joint survey was reported to defendant in error he was

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dissatisfied with it and obtained a man by the name of Martin to make a further survey. Mr. Martin, as he says himself, had never done any surveying in mines prior to this time; "In making this survey I had the ordinary railroad transit; it had the compass and needle transit and vanger apparatus. It had a magnetic needle; it is a Gurley transit I think, I am not sure. I have three and I don't know which I had with me." "At any rate I made this survey in this mine with the ordinary surveyor's transit; it has a magnetic needle in it. I didn't locate my lines by means of the magnetic needle but I used it for taking courses and in taking angles." While upon the witness stand he did not give the measurements of the coal taken out upon this land and said he could not then do so but that he had computed it from a plat made and that he estimated two thousand tons of coal had been removed from the land of defendant in error. The testimony of Wilson, Rollo and Fred E. Richart, who was also a mining engineer, and who heard the evidence of Martin and the description of the apparatus used by him, is that you could not make an accurate survey in a mine with the character of instrument used by Mr. Martin, for the reason that in a mine the water pipes, air pipes, electric wires, rails, cars and other iron and steel objects that are in a mine are liable to attract the needle one way or the other, and a slight deflection of the needle will very materially affect the survey; and Rollo and Wilson in addition say, that the instrument used and described by Mr. Martin was not of the character to produce correct results and this is not disputed by any one. It is true that Mr. Martin says that he did not locate the lines by means of the needle but used it in taking courses and angles.

The fact that Martin had never had any experience in mining engineering but had devoted his time exclusively to surveying on top of the ground, and the further fact that he used an instrument

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The fact that Martin had never had any experience in mining engineering but had devoted his time exclusively to surveying on top of the ground, and the further fact that he used an instrument

that could not be relied upon in making such a survey, we think at best makes the results obtained by him at least uncertain. When three mining engineers experienced in the business, whose testimony appears to be fair, say that the measurements as made by Mr. Martin are not reliable, and when it further appears that the engineers Wilson and Stanley first employed by defendant in error to make this survey, together with the engineer Rello employed by plaintiff in error, after making their respective surveys and found a discrepancy to exist between them, went over the survey together, checked their lines, stations and measurements and, as they say, secured an accurate survey and measurement and determined that there was only eighty-four and seven-tenths tons removed from plaintiff's premises, we cannot permit a verdict to stand that takes the measurements of an inexperienced man made with an instrument not reliable in preference to the testimony of so many other mining engineers who had had experience and used what they claimed to be the latest improved and most accurate instruments for such work. It is said by counsel for defendant in error that the witness Richart tends to corroborate the theory of Martin with reference to this survey; We do not so understand his testimony. He said he knew nothing about the survey and the testimony referred to was simply with reference to what was shown by a map that was made some time ago but the map was not in evidence and we do not regard statements of the witness as being material. ~~It is also claimed that the witness Rello was contradicted. This is true but the contradiction~~ [illegible]

that could not be relied upon in making such a survey, we think at best makes the results obtained by him at least uncertain. When three mining engineers experienced in the business, whose testimony appears to be fair, say that the measurements as made by Mr. Martin are not reliable, and when it further appears that the engineers Wilson and Stanley first employed by defendant in error to make this survey, together with the engineer Rollo employed by plaintiff in error, after making their respective surveys and found a discrepancy to exist between them, went over the survey together, checked their lines, stations and measurements and, as they say, secured an accurate survey and measurement and determined that there was only eighty-four and seven-tenths tons removed from plaintiff's premises, we cannot permit a verdict to stand that takes the measurements of an inexperienced man made with an instrument not reliable in preference to the testimony of so many other mining engineers who had had experience and used what they claimed to be the latest improved and most accurate instruments for such work. It is said by counsel for defendant in error that the witness Richart tends to corroborate the theory of Martin with reference to this survey; We do not so understand his testimony. He said he knew nothing about the survey and the testimony referred to was simply with reference to what was shown by a map that was made some time ago but the map was not in evidence and we do not regard statements of the witness as being material.

~~disclosed~~ It is contended by counsel for defendant in error that as this was a question of fact purely, that the verdict of the jury ought to be taken as declaring the proper result. This is true absolutely unless it appears from the evidence that the verdict arrived at by the jury is manifestly against its weight. "The constitution, which provides that the right of trial by jury as previously enjoyed shall remain inviolate, does not make the jury the final judges of the weight of evidence, and if a verdict is manifestly against the weight of the evidence it is the duty of the trial judge to set it aside and grant a new trial, and a failure to do so is error, for which a judgment must be reversed." Donelson vs. East St. L. E. R. Co., 235 Ill., 625; Loettker vs. Chi. City Ry. Co., 150 App.,69.

The burden of proof to show the amount of coal removed from the land of defendant in error was upon the defendant in error. He sought to establish this by the testimony of an engineer inexperienced in the performance of this character of work, who had made the examination with the character of instrument above described. When we compare such testimony with the evidence of the witnesses of plaintiff in error, three of whom had knowledge and were engaged in the making of this special survey, and for the purpose of ascertaining the difference between the survey of Wilson and Stanley and the one made by Hollo went over the work, checked it and used more modern instruments, which the testimony shows to be much better for this character of work, we do not hesitate to say that the verdict of the jury was manifestly against the weight of the evidence and for that reason the court erred in not granting the motion of plaintiff in error for a new trial. The judgment is reversed and cause remanded.

REVERSED AND REMANDED.

(Not to be reported in full.)

~~Judgment~~. It is contended by counsel for defendant in error that as this was a question of fact purely, that the verdict of the jury ought to be taken as declaring the proper result. This is true absolutely unless it appears from the evidence that the verdict erred at by the jury is manifestly against its weight. "The constitution, which provides that the right of trial by jury as previously enjoyed shall remain inviolate, does not make the jury the final judges of the weight of evidence, and if a verdict is manifestly against the weight of the evidence it is the duty of the trial judge to set it aside and grant a new trial, and a failure to do so is error, for which a judgment must be reversed." Donelson vs. East St. L. R. R. Co., 235 Ill., 625; Loettker vs. Cht. City Ry. Co., 180 App., 69.

The burden of proof to show the amount of coal removed from the land of defendant in error was upon the defendant in error. He sought to establish this by the testimony of an engineer in experienced in the performance of this character of work, who made the examination with the character of instrument above described. When we compare such testimony with the evidence of the witnesses of plaintiff in error, there of who had knowledge and were engaged in the making of this special survey, and for the purpose of ascertaining the difference between the survey of Wilson and Stanley and the one made by Nolle went over the work, checked it and used more modern instruments, which the testimony shows to be much better for this character of work, we do not hesitate to say that the verdict of the jury was manifestly against the weight of the evidence and for that reason erred in not granting the motion of plaintiff in error for a new trial. The judgment is reversed and cause remanded.

Reversed and remanded.

(Not to be reported in full.)

NOINI

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st day of May, A. D. 1914.

A. C. Millspaugh

Clerk of the Appellate Court.

Opinion entered Oct 28, 1914

154

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. W. S. PAYNE, Sheriff.

190 I.A. 572

And afterwards in Vacation, after said March term, to-wit: On the 1st day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Builders Supply & Coal Co

vs.

No. 32

October Term, 1913.

Eggman et al

~~ERROR TO~~
APPEAL FROM

City COURT

E. St Louis ~~COUNTY~~

TRIAL JUDGE

Hon. R H Flanagan

Term No. 22. Agenda No. 53.

October Term, 1913.

Builders Supply and Coal Company, Appellee, vs. R. J. Eggmann, Appellant.	Appeal from the City Court of East St. Louis.

Opinion by Higbee, J.

On December 14, 1911, appellee, the Builders Supply and Coal Company, a corporation, filed a petition for mechanics lien in the city court of East St. Louis, to enforce such lien against the west half of lot 15 Audubon Place, Lansdowne, now a part of East St. Louis, Illinois, making R. J. Eggmann, appellant, and Homer Crutchfield, defendants. Later James F. Moorehead and others filed a petition in the same court for the same purpose and subsequently the East St. Louis Lumber Company filed a like petition. To these petitions additional defendants were afterwards added and a number of intervening petitions were filed by other claimants in said suits. At the September term, 1912, of said court, the three suits were consolidated and referred to the master to take the proofs and report the same and his findings. Objections were filedto the master's report, which being overruled, were later filed as exceptions on the final hearing, when a decree was entered. From the joint decree, three separate appeals were taken, one by R. J. Eggmann, appellant in this case, one by James F. Moorehead and one by the East St. Louis Lumber Company. Our attention in this case is confined to the Eggmann appeal.

The matters for our determination grew out of the following facts and circumstances shown by the proofs in the case. On April 18, 1911, R. J. Eggmann, T. F. Eggmann and Horace J. Eggmann, were associated together in the real estate business and in pur-

Term No. 46. Appeals No. 52.

October Term, 1913.

Builders Supply and Coal Company, Appellee, vs. H. J. Eggmann, Appellant.	Appeal from the City Court of East St. Louis.

Opinion by Higbee, J.

On December 14, 1911, appellee, the Builders Supply and Coal Company, a corporation, filed a petition for mechanics lien in the city court of East St. Louis, to enforce such lien against the west half of lot 15 Audubon Place, Lenadowne, now a part of East St. Louis, Illinois, making H. J. Eggmann, appellant, and Homer Crutchfield, defendants. Later James F. Moorehead and others filed a petition in the same court for the same purpose and subsequently the East St. Louis Lumber Company filed a like petition. To these petitions additional defendants were afterwards added and a number of intervening petitions were filed by other claimants in said suits. At the September term, 1912, of said court, the three suits were consolidated and referred to the master to take the proofs and report the same and his finding. Objections were filed to the master's report, which being overruled, were later filed as exceptions on the final hearing, when a decree was entered. From the joint decree, three separate appeals were taken, one by H. J. Eggmann, appellant in this case, one by James F. Moorehead and one by the East St. Louis Lumber Company. Our attention in this case is confined to the Eggmann appeal.

The matters for our determination grew out of the following facts and circumstances shown by the proofs in the case. On April 16, 1911, H. J. Eggmann, T. F. Eggmann and Fermer L. Eggmann, were associated together in the real estate business and in pur-

suance thereof bought vacant lots and built houses thereon, to be sold or rented. On that date they purchased vacant real estate which included that above described and gave a mortgage on the whole tract to William Urban for $1,675.00. On June 27, 1912, when the amount due on the mortgage had been reduced to $875.00, the balance was paid to Urban and the note assigned to Horace J. Eggmann, who at the time of the trial held it as trustee for the firm. On July 1, 1911, the following contract was entered into by appellant with Homer Crutchfield:

"East St.Louis, Ill., July 1, 1911.

This is an agreement by and between R. J. Eggmann and Homer Crutchfield as follows: The said Crutchfield agrees to purchase the west one half of lot 15, Audubon place, Lansdowne, East St. Louis, Ill., of the said R. J. Eggmann for the sum of six hundred dollars($600); said amount of six hundred dollars to be taken out of a loan for twenty five hundred dollars which said Eggmann agrees to make the said Crutchfield on a certain brick cottage as per plans submitted, same to be built on the above described lot, said house to be started within one week of this date and to be completed by September 1, 1911. All expenses of loan and insurance to be paid by Crutchfield. In case of shortage in funds, the said Eggmann agrees to take four hundred fifty dollars upon the completion of the loan and take back second mortgage for the sum of one hundred fifty dollars on the above described property. Mortgages are to be made by Crutchfield and wife and upon the completion of said mortgages said Crutchfield agrees to make deed to said R. J. Eggmann as further security. It is agreed by and between the parties hereto that the net profits derived from the sale of this property or rental of same to be equally divided between the parties hereto. Nothing in this contract shall be construed to affect any of the stipulations in mortgage to be

rance thereof bought vacant lots and built houses thereon, to be sold or rented. On that date they purchased vacant real estate which included that above described and gave a mortgage on the whole tract to William Urban for $1,875.00. On June 27, 1912, when the amount due on the mortgage had been reduced to $875.00, the balance was paid to Urban and the note assigned to Horace L. Eggmann, who at the time of the trial held it as trustee for the firm. On July 1, 1911, the following contract was entered into by appellant with Homer Crutchfield:

"East St.Louis, Ill., July 1, 1911.

This is an agreement by and between R. J. Eggmann and Homer Crutchfield as follows: The said Crutchfield agrees to purchase the west one half of lot 18, Audubon place, Lenadowne, East St. Louis, Ill., of the said H. L. Eggmann for the sum of six hundred dollars($600); said amount of six hundred dollars to be taken out of a loan for twenty five hundred dollars which said Eggmann agrees to make the said Crutchfield on a certain brick cottage as per plans submitted, same to be built on the above described lot, said house to be started within one week of this date and to be completed by September 1, 1911. All expenses of loan and insurance to be paid by Crutchfield. In case of shortage in funds, the said Eggmann agrees to take four hundred fifty dollars upon the completion of the loan and take back second mortgage for the sum of one hundred fifty dollars on the above described property. Mortgages are to be made by Crutchfield and wife and upon the completion of said mortgages said Crutchfield agrees to make deed to said H. L. Eggmann as further security. It is agreed by and between the parties hereto that the net profits derived from the sale of this property or rental of same to be equally divided between the parties hereto. Nothing in this contract shall be construed to affect any of the stipulations in mortgage to be

made. This agreement to remain in full force and effect for two yearsfrom this date and the said Eggmann is to collect all rents or monthly payments in case said property is rented or sold on monthly payments. Money so received are to take care of interest on mortgages and the payment of the said second mortgage should there be one, after which said money received is to be equally divided between the parties hereto.

R. J. Eggmann,"

This contract was not signed by Crutchfield, but he appears to have adopted the same as his own and proceeded to have the house provided for therein erected on the premises. He purchased the necessary materials therefor, from appellee and other dealers and made contracts with mechanics for its construction, which was done with the knowledge and consent of appellant. The work was visited several times a week by F. D. Eggmann who testified that he acted as agent for appellant in that matter. After the house was substantially completed, it was discovered that the work and material were costing far in excess of the amount contemplated and further execution of the contract was abandoned. Among the claims growing out of the matter which were unpaid, was one of appellee's for $154.26 for material used in the building and $59.35 for money advanced to pay for labor. There was also due and unpaid to J. Steinkopf the sum of $148.59 for material furnished and labor done in plastering the house, which account was purchased by and assignedto appellee by Steinkopf and the assignment presented to and accepted by Crutchfield. Appellee furnished the last of the material for which he claims, on October 27, 1911, and his attorney testified that on November 25, 1911, he served on appellant anotice addressed to appellant and Crutchfield, showing there was $303.00 due appellee. On December 14, 1911, appellee filed the petition above referred to to enforce a lien against said premises, stating that during the

made. This agreement to remain in full force and effect for two years from this date and the said Eggmann is to collect all rents or monthly payments in case said property is rented or sold on monthly payments. Money so received are to take care of interest on mortgage and the payment of the said second mortgage should there be one, after which said money received is to be equally divided between the parties hereto.

E. F. Eggmann.

This contract was not signed by Crutchfield, but he appears to have adopted the same as his own and proceeded to have the house provided for therein erected on the premises. He purchased the necessary materials therefor, from appellee and other dealers and made contracts with mechanics for its construction, which was done with the knowledge and consent of appellant. The work was visited several times by E. F. Eggmann who testified that he acted as agent for appellant in that matter. After the house was substantially completed, it was discovered that the work and material were costing far in excess of the amount contemplated and further execution of the contract was abandoned. Among the claims growing out of the matter which were unpaid, was one of appellee's for $125.00 for material used in the building and $58.35 for money advanced to pay for labor. There was also due and unpaid to J. Steinkopf the sum of $148.50 for material furnished and labor done in plastering the house, which account was purchased by and assigned to appellee by Steinkopf and the assignment presented to and accepted by Crutchfield. Appellee furnished the last of the material for which he claims, on October 27, 1911, and has attempt testified that on November 25, 1911, he served on appellant notice addressed to appellant and Crutchfield, showing there was $303.00 due appellee. On December 14, 1911, appellee filed the petition above referred to in enforce a lien against said premises, stating that during the

month of July, 1911, Homer Crutchfield, applied to petitioner for terms on which petitioner would furnish building supplies, lime and cement to be installed in the building then being erected on the property above described; that prices were given him and a contract agreed upon and material furnished to the amount of $362.20, an itemized statement of said bill being affixed and attached to the petition and made a part of the same. It was also alleged that appellant was the owner of the property and knowingly permitted Crutchfield to improve it. The statement attached sets out in detail the material furnished amounting to $154.26, the several amounts of cash advanced by petitioner for labor amounting to $59.35 and the contract for material furnished and work done in plastering the house, amounting to $148.59 making a total of $362.20. The master in his report found, among other things, that appellee gave appellant a legal sub-contractor's notice within sixty days after the last material was furnished; also that appellant and Crutchfield were partners and that such notice was unnecessary; that appellee was entitled to its lien for material and the Steinkopf claim assigned to it, but was not entitled to the lien for $59.35 cash advanced by it; that Horace J. Eggmann held the mortgage assigned to him in trust for the firm and it should have been satisfied out of the proceeds of the parts of the lot already sold; that the mechanics liens asked for were superior to any lien of said mortgage. On the final hearing the court entered a decree finding that a sufficient notice had been given that appellee was entitled to a lien for the amount found by the master and that the mortgage assigned to Horace J. Eggmann, trustee, had merged with the fee and the lien thereby become released. The decree appears to proceed on the theory that Crutchfield was a contractor and that those who contracted with him were sub-contractors and that a sub-contractor's notice was necessary but that as above stated, such notice

month of July, 1921, Ernest Crutchfield, applied to petitioner for terms on which petitioner would furnish building supplies, lime and cement to be installed in the building then being erected on the property above described; that prices were given him and a contract agreed upon and material furnished to the amount of $292.20, as itemized statement of said will being affixed and attached to the petition and made a part of the same. It was also alleged that appellant was the owner of the property and knowingly permitted Crutchfield to improve it. The statement attached note and in detail the material furnished amounting to $134.26, the several amounts of cash advanced by petitioner for labor amounting to $29.35 and the contract for material furnished and work done in plastering the house, amounting to $148.39 making a total of $292.20. The master in his report found, among other things, that appellee gave appellant a legal sub-contractor's notice within sixty days after the last material was furnished; also that appellant and Crutchfield were partners and that such notice was unnecessary; that appellee was entitled to the lien for material and the "teinkopf claim assigned to it, but was not entitled to the lien for $29.35 cash advanced by it; that Horace L. Eggeman held the mortgage assigned to him in trust for the firm and it should have been satisfied out of the proceeds of the parts of the lot already sold; that the mechanics liens asked for were superior to any lien of said mortgage. On the final hearing the court entered a decree finding that a sufficient notice had been given that appellee was entitled to a lien for the amount found by the master and that the mortgage assigned to Horace L. Eggeman, trustee, had merged with the fee and the lien thereby become released. The decree appears to proceed on the theory that Crutchfield was contractor and that those who contracted with him were sub-contractors and that a sub-contractor's notice was necessary but that as above stated, such notice

had been given in this case.

Appellant contends that the proofs were too inconsistent with the petition and statement attached thereto, to warrant the court in entering the decree; that the claim for cash advanced for labor included in appellee's petition and statement, was a fraud and defeated its right to a lien for any amount; that appellee was a sub-contractor and the notice given by it was not properly signed and that there was not sufficient proof of its service or the delivery of the material claimed for; that in any event, appellee could only recover for the material furnished and not for the Steinkopf bill for plastering assigned to it. Reference to the written contract shows an arrangement whereby Crutchfield was to purchase the lot and improve the same by the erection of a brick cottage thereon; that appellant was to make Crutchfield a loan of $2,500.00 on the lot, improved by the cottage, out of which was to be paid the sum of $600.00 purchase money for the lot, with a provision that $150.00 of said last mentioned sum might, if necessary, be used for the completion of the building and a second mortgage taken by appellant therefor; that the net profits which might be derived from the sale of the property, should be equally divided between the parties; that the agreement was to remain in force two years and appellant was to collect all rents or monthly payments in case of a sale, and use the money so received to pay the interest on the mortgages and liquidate the second mortgage. It does not appear from the contract that Crutchfield was employed by appellant to construct the house for him or that there was to be any joint ownership of the property itself by appellant and Crutchfield. Crutchfield was apparently to furnish all the funds necessary to build the cottage, which were to be repaid to him out of the loan of $2,500.00 to be made by appellant. Appellant was

had been given in this case.

Appellant contends that the proofs were too inconsistent with the pleadings and statement attached thereto, to warrant the court in entering the decree; that the claim for each advanced for labor included in appellee's petition and statement, was a fraud and defeated the right to a lien for any amount; that appellee was a sub-contractor and the notice given by it was not properly signed and that there was not sufficient proof of its service or the delivery of the material claimed for; that in any event, appellee could only recover for the material furnished and not for the "bankept bill for plastering designed to it." Reference to the written contract shows an arrangement whereby Crutchfield was to purchase the lot and improve the same by the erection of a brick cottage thereon; that appellant was to make Crutchfield a loan of $2,500.00 on the lot, improved by the cottage, out of which was to be paid the sum of $600.00 purchase money for the lot, with a provision that $150.00 of said last mentioned sum might, if necessary, be used for the completion of the building and a second mortgage taken by appellant therefor; that the net profits which might be derived from the sale of the property, should be equally divided between the parties; that the agreement was to remain in force two years and appellant was to collect all rents or monthly payments in case of a sale, and use the money so received to pay the interest on the mortgages and liquidate the second mortgage. It does not appear from the contract that Crutchfield was employed or expected to construct the house for him or that there was to be any joint ownership of the property itself by appellant and Crutchfield. Crutchfield was apparently to furnish all the funds necessary to build the cottage, which were to be paid to him out of the loan of $2,500.00 to be made by appellant. Appellant was

also to be paid for the lot out of the money borrowed or in case there was not sufficient in that fund to take a second mortgage to the extent of $150.00. The intention of the contract plainly was that appellant should part with his title for which he was to be fully compensated and that Crutchfield should become the owner thereof, but as a matter of fact appellant never conveyed the title to Crutdhfield.

The law in making a distinction between contractors and sub-contractors and providing that notice should be served on the owner by the sub-contractor within a limited time, intended not alone to protect the sub-contractor but also the owner who might when notified keep what was due the sub-contractor from the amount due the contractor, but in this case there was nothing due Crutchfield from appellant and therefore a notice would have availed nothing and the reason for the law failed. There was no contract by which Crutchfield wasto build the house or furnish work and material for appellant and therefore he would not properly be a contractor within the meaning of the lien statute, and appellee and others who contracted directly with him for furnishing labor and material were the principal contractors and not sub-contractors. A notice from appellee as sub-contractor was therefore not necessary in this case, although the proof seems to be sufficient to sustain the claim that proper notice was given within the sixty days required by statute.

The fact that the legal title to the premises remained vested in appellant, will not avail him in his defense made here, as section one of the lien statute provides that, any one who shall by any contract, express or implied, with one whom the owner has authorized or knowingly permitted to contract for the improvement of or to improve his premises, furnish labor or materials therefore, shall be entitled to a lien upon said premises

also to be paid for the lot out of the money borrowed or in case there was not sufficient in that fund to take a second mortgage in the extent of $180.00. The intention of the contract plainly was that appellant should part with his title for which he was to be fully compensated and that Crutchfield should become the owner thereof, but as a matter of fact appellant never conveyed the title to Crutchfield.

The law in making a distinction between contractors and sub-contractors and providing that notice should be served on the owner by the sub-contractor within a limited time, intended not alone to protect the sub-contractor but also the owner who might when notified keep what was due the sub-contractor from the amount due the contractor, but in this case there was nothing due Crutchfield from appellant and therefore a notice would have availed nothing and the reason for the law failed. There was no contract by which Crutchfield was to build the house or furnish work and material for appellant and therefore he would not properly be a contractor within the meaning of the lien statute, and appellee and others who contracted directly with him for furnishing labor and material were the principal contractors and not sub-contractors. A notice from appellee as sub-contractor was therefore not necessary in this case, although the proof seems to be sufficient to sustain the claim that proper notice was given within the sixty days required by statute.

The fact that the legal title to the premises remained vested in appellant, will not avail him in his defense made here, as section one of the lien statute provides that, any one who shall by any contract, express or implied, with one whom the owner has authorized or knowingly permitted to contract for the improvement of or to improve his premises, furnish labor or materials therefore, shall be entitled to a lien upon said premises

for such labor and materials.

In regard to Steinkopf's claim for material and work done in plastering the house on the premises in question, which was assigned to appellee, the proof showed that the material was bargained for and delivered and that Crutchfield accepted the assignment of the claim. Under these circumstances appellant could not be heard to object as the statute provides that "All liens or claims for lien which may arise or accrue under the terms of this act, shall be assignable, and proceedings to enforce such liens or claims for lien, may be maintained by and in the name of the assignee, who shall have as full and complete power to enforce the same, as if such proceedings were taken under the provisions of this act, by and in the name of the lien claimant." Rev.Stat.chap.82,sec. 22. The petition was not as complete and exact as it might properly have been made yet there was no such variance between it and the proofs as ought to affect the decree in this case. While the wilful and fraudulent filing of a claim for an excessive amount, may under some circumstances defeat the allowance of the lien (Marsh v. Kick 159 Ill. App.399), yet the fact that appellee included in its statement money advanced for labor performed upon the premises in question,does not appear to us to show any fraud was committed or contemplated by appellee, nor does it tend to defeat its right to a lien for the amount to which it is entitled.

The proofs showed that appellant furnished the material as claimed by him and that the same went into the construction of the cottage in question and that he paid Steinkopf for the plasterer's bill which was assigned to him and that he is entitledto the lien he asked for. It appears from the record in this case that S. P. Crump for himself and as assignee of L. F. Wayne filed an intervening petition to the petition of the East S t.Louis Lumber Co. setting forth claims of said parties against said premises

for such labor and materials.

In regard to Steinhopf's claim for material and work done in plastering the house on the premises in question, which was assigned to appellee, the proof showed that the material was bargained for and delivered and that Trustafield accepted the assignment of the claim. Under these circumstances appellant could not be heard to object as the statute provides that "All liens or claims for lien which may arise or accrue under the terms of this act, shall be assignable, and proceedings to enforce such liens or claims for lien, may be maintained by and in the name of the assignee, who shall have as full and complete power to enforce the same, as if such proceedings were taken and under the provisions of this act, by and in the name of the lien claimant." Rev.Stat.chap.82,sec. 22. The petition was not as complete and exact as it might properly have been made yet there was no such variance between it and the proofs as ought to defeat the decree in this case. While the wilful and fraudulent filing of a claim for an excessive amount, may under some circumstances defeat the allowance of the lien (Marsh v. Wick 159 Ill. App.259), yet the fact that appellee included in its statement money advanced for labor performed upon the premises in question,does not appear to us to show any fraud was committed or contemplated by appellee, nor does it tend to defeat its right to a lien for the amount to which it is entitled.

The proofs showed that appellant furnished the material as claimed by him and that the same went into the construction of the cottage in question and that he paid Steinhopf for the plasterer's bill which was assigned to him and that he is entitled to the lien he asked for. It appears from the record in this case that S. F. Crump for himself and as assignee of F. F. Wayne filed an intervening petition to the petition of the West S t.Louis Co. setting forth claims of said parties against said

for labor performed by them in connection with the erection of said building. In the decree the court below sustained the claim of said Crump for $31.40 and the claim of said Wayne for $30.00 and orderedthat the same be liens upon said premises for said respective amounts. It is doubtful whether appellant Eggmann, has properly prayed for or perfected an appeal from said decree so far as it concerns the allowance of the said liens in favor of Crump and Wayne, but waiving this question and assuming that the appeal is in all respects regular as affecting said parties, we have considered the objections raised by appellant in regard to the allowance of said liens and have concluded that they are fully covered by what is above said concerning the claim of Builders Supply and Coal Company, and that said liens should be sustained.

The decree of the court below in so far as it affects the rights of the Builders Supply and Coal Company, E. F.C-rump and M. F. Wayne is affirmed.

Affirmed.

(Not to be reported in full.)

for labor performed by them in connection with the erection of said building. In the decree the court below sustained the claim of said Crump for $21.40 and the claim of said Ayres for $30.00 and ascertained the sums be liens upon said premises for said respective amounts. It is doubtful whether appellant Bowman, has properly prayed for or perfected an appeal from said decree so far as it concerns the allowance of the said $ liens in favor of Crump and Ayres, but waiving this question and assuming that the appeal is in all respects regular as affecting said parties, we have considered the objections raised by appellant in regard to the allowance of said liens and have concluded that they are fully covered by what is above said concerning the claim of Builders Supply and Coal Company, and that said liens should be sustained.

The decree of the court below in so far as it affects the rights of the Builders Supply and Coal Company, C. F. Crump and S. F. Ayres is affirmed.

Affirmed.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of May, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

NOINI

153

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the 1st day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

190 I.A. 578

~~ERROR TO~~
APPEAL FROM

Moorehead et al

vs.

No. 23

October Term, 1913.

Builders Supply Co

City COURT

E St Louis ~~COUNTY~~

TRIAL JUDGE

Hon. R W Flannigan

Term No. 23. Agenda No. 54.

October Term, 1913.

James F. Moorehead, Appellant, vs. R. J. Eggmann, ~~et al~~, Appellee.	Appeal from the City Court of East St. Louis.

Opinion by Higbee, J.

The cases of Builders Supply and Coal Company against R.J. Eggmann and others, James F. Moorehead and others against same and East St. Louis Lumber Company against same, all mechanics lienx cases against the same property and pending in the city court of East St. Louis, were on motion of counsel for the defendant, R. J. Eggmann, at the September term, 1911, of said court, consolidated and tried as one case. From the joint decree so entered three separate appeals were taken to this court. Said R. J. Eggmann appealed from the decree so far as it found in favor of the Builders Supply and Coal Company, while J. F. Moorehead and the East St. Louis Lumber Company appealed because the court, by its decree, refused to sustain their claimsof liens upon the premises. The first mentioned of these appeals entitled Builders Supply and Coal Company, appellee against R.J. Eggmann, appellant, involving important facts and questions of law that are involved in all said cases, has been reviewed by this court at the present term and reference may be had to the opinion filed therein for a statement of the essential facts involved and the conclusions of this court as to the law governing the same.

In the decree in the consolidated cases, the court found that James F. Moorehead, the appellant here, contracted with Homer Crutchfield to do certain plumbing work and furnish certain materials for the improvements then being made by said Crutchfield

Term No. 33. Agenda No. 54.

October Term, 1913.

James F. Moorehead,
Appellant,

vs.

R. J. Eggmann,
Appellee.

Appeal from the City Court of East St. Louis.

Opinion by Higbee, J.

The cases of Builders Supply and Coal Company against R.J. Eggmann and others, James F. Moorehead and others against same and East St. Louis Lumber Company against same, all mechanics lien cases against the same property and pending in the city court of East St. Louis, were on motion of counsel for the defendant, R. J. Eggmann, at the September term, 1911, ordered consolidated and tried as one case. From the joint decree so entered three separate appeals were taken to this court. Said R. J. Eggmann appealed from the decree so far as it found in favor of the Builders Supply and Coal Company, while J. F. Moorehead and the East St. Louis Lumber Company appealed because the court, by its decree, refused to sustain their claims of lien upon the premises. The first mentioned of these appeals entitled Builders Supply and Coal Company, appellee against R.J. Eggmann, appellant, involving important facts and questions of law that are involved in all said cases, has been reviewed by this court at the present term and reference may be had to the opinion filed therein for a statement of the essential facts involved and the conclusions of this court as to the law governing the same.

In the decree in the consolidated cases, the court found that James F. Moorehead, the appellant here, contracted with Dawes Crutchfield to do certain plumbing work and furnish certain materials for the improvements then being made by said Crutchfield

on the premises in question and that appellant furnished said labor and materials in and about the performance of his said contract, together with certain extra material and labor, amounting to the sum of $203.00; that he completed his contract on September 9, 1911, and served a sub-contractor's notice on N.J. Eggmann theowner of the premises on the [illegible]th day of November, 1911; that he was entitled to recover from Crutchfield said sum of $203.00 but was not entitled to a lien on said premises for said claim. The court therefore ordered that appellant's bill be dismissed for want of equity and that he pay a certain share of the costs to be determined in a manner provided for by decree.

The decree was based on the theory that Crutchfield was the principal contractor and that the parties furnishing the work and supplies were sub-contractors and that appellant Moorehead had failed to serve notice as a sub-contractor upon appellee Eggmann within 60 days after he had completed his contract. Appellant contended below and in this court, that his contract was not completed until sometime in November, when he claims Crutchfield required him to do certain extra work in draining the pipes and fixtures so that they would not freeze.

The proofs show that the labor and materials claimed for by appellant were furnished for the building and the value of the same, as fixed by him, is not disputed. In our opinion filed in the case of the Builders Supply and Coal Company against Eggmann above referredto, we discussed the question as to whether Crutchfield was to be considered the original contractor for the building of the cottage on the premises in question and decided that he was not and further held that those who, like appellant in this case, made contracts with Crutchfield for furnishing materials and labor, were to be considered as contractorsand not as sub-contractors and that therefore it was not necessary for any

on the premises in question and that appellant furnished said labor and materials in and about the performance of his said contract, together with certain extra material and labor, amounting to the sum of $203.00; that he completed his contract on September 9, 1911, and served a sub-contractor's notice on T.J. Eggman the owner of the premises on the 28th day of November, 1911; that he was entitled to recover from Crutchfield said sum of $203.00 but was not entitled to a lien on said premises for said claim. The court therefore ordered that appellant's bill be dismissed for want of equity and that he pay a certain share of the costs to be determined in a manner provided for by decree.

The decree was based on the theory that Crutchfield was the principal contractor and that the parties furnishing the work and supplies were sub-contractors and that appellant Wentworth had failed to serve notice as a sub-contractor upon appellee Eggman within 60 days after he had completed his contract. Appellant contended below and in this court, that his contract was not completed until something in November, when he claims Crutchfield required him to do certain extra work in draining the pipes and fixtures so that they would not freeze.

The proofs show that the labor and materials claimed for by appellant were furnished for the building and the value of the same, as fixed by him, is not disputed. In our opinion filed in the case of the Builders Supply and Coal Company against Eggman above referred to, we discussed the question as to whether Crutchfield was to be considered the original contractor for the building of the cottage on the premises in question and decided that he was not and further held that there was, like appellant in this case, made contracts with Crutchfield for furnishing materials and labor, were to be considered as contractors and not as sub-contractors and that therefore it was not necessary for any

one of them to give the notice required by the statute of sub-contractors, within 60 days from the completion of the work. What is said in that opinion upon this question, is equally applicable here and must be held to apply to this case and need not be repeated. The petition in this case while not stating that appellant was a sub-contractor, proceeds on the theory that Crutchfield was the original contractor and alleges that a sub-contractor's lien had been served by appellant upon appellee Aggmann as the owner of the property. The question is raised therefore as to whether there was a variance between the allegations and the proofs. In considering this question it should be borne in mind that there were several petitions presented and they were all consolidated in one suit and it therefore became necessary for the court to determine the rights of all the parties at one and the same hearing.

In Springer v. Kroeschell, 59 Ill. App., 434 (Aff. 161 Ill. 358) the court says, "It is settled that the proper course of practice is to consolidate all pending petitions for mechanic's liens against the same premises in order that there may be but one decree and one sale, and it is not at all essential to the integrity of the decree that the various claimants for liens should state the ownership of the premises to be the same, nor that they should state that they contracted with the same person as, or as claiming to be, owners of the premises. The interest that the person contracted with has in the premises is what is liable to the lien, and may be sold to satisfy the lien, and the proof determines what that is; and it may not be the same as to each lien claimant."

In Thielman v. Carr, 75 Ill., 385, the opinion in the discussion of a similar principle stated: "The statute requires all persons in interest to be brought before the court, and not to

one of them to give the notice required by the statute of subcontractors, within 60 days from the completion of the work. What is said in that opinion upon this question, is equally applicable here and must be held to apply to this case and need not be repeated. The petition in this case while not stating that appellant was a sub-contractor, proceeds on the theory that Crutchfield was the original contractor and alleges that a sub-contractor's lien had been served by appellant upon respondent Wyman as the owner of the property. The question is raised therefore as to whether there has a variance between the allegations and the proofs. In considering this question it should be borne in mind that there were several petitions presented and they were all consolidated in one suit and it therefore became necessary for the court to determine the rights of all the parties at one and the same hearing.

In Gurleyer v. Kroenewell, 39 Ill. App., 494 (AFF. 143 Ill. 384) the court says, "It is settled that the proper course of practice is to consolidate all pending petitions for mechanic's liens against the same premises in order that there may be but one decree and one sale, and it is not at all essential to the integrity of the decree that the various claimants for liens should state the ownership of the premises to be the same, nor that they should state that they contracted with the same person as, or as claiming to be, owners of the premises. The interest that the person contracted with has in the premises is what is liable to the lien, and may be sold to satisfy the lien, and the proof determines what that is; and it may not be the same as to each lien claimant."

In Thielman v. Carr, 75 Ill., 388, the opinion in the disposition of a similar principle stated: "The statute requires all persons in interest to be brought before the court, and not to

make a final order until all are heard, and to distribute the fund among the claimants in proportion to their claims.... The right is cast by the statute upon the parties, and when brought before the court, they, like parties to a bill for an account, all become actors. When one lien holder has filed his petition to subject the property to the payment of his claim, it is a proceeding to subject the property as a fund, not only for the satisfaction of his own lien, but for all other liens enumerated in the statute. It from that time forward becomes a fund for distribution among the lien holders." While these cases were decided under a former statute the same reasoning applies to the present statute which is essentially similar to the statute referred to in this regard, and the same doctrine is approved in Shields v. Borg, 129 Ill. App.,266.

It would appear from these cases to be the theory of the law that when a petition has been filed, under which the property in question can be subjected to the lien of those furnishing labor or material for improvement thereon, that all parties having similar claims may present them to the court to be heard at the same time and that the court having jurisdiction of the property as a fund, will direct the satisfaction not only of the debt of the original petitioner or claimant but also that of the other claimants whose claims have been presented and that discrepancies and irregularities in the petitions or answers presenting the claims, will be disregarded, provided the substance of the claim is set forth in some one or more of the petitions presenting such claims. In this case when the Builders Supply and Coal Company filed its petition against appellee the matters alleged were, as appears from our opinion in that case, sufficient to enable it to establish its claim thereunder. Appellant Moorehead might have filed an answer to that petition and set up his

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I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of May, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

PINION

136

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee. Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff.*

And afterwards in Vacation, after said March term, to-wit: On the [illegible] *day of May, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

190 I.A. 580

E. St. Louis Lumber Co.

vs.

No. 98

October Term, 1913.

Crutchfield et al

~~ERROR TO~~
APPEAL FROM

City COURT

E. St. Louis ~~COUNTY~~

TRIAL JUDGE

Hon. P. H. Flanagan

Term No. 28. Agenda No. 55.

October Term, 1913.

East St. Louis Lumber Company, Appellant, vs. A. J. Eggmann, Appellee.	Appeal from the City Court of East St. Louis.

Opinion by Higbee, J.

This is one of three appeals from a decree entered in the city court of East St. Louis, upon petitions filed therein, to enforce a mechanics lien for labor and material furnished in the construction of a cottage erected on a lot in Audubon Place, Lansdowne, an addition to said city. The other suits in both of which opinions are filed, at the present term of this court, are Builders Supply and Coal Company against Eggmann and Moorehead against the same and in those opinions, will be found a full statement of the facts leading up to the construction of the cottage, the filing of the petitions and our views as to the questions of law, concerning the transaction.

The appellant in this case, East St. Louis Lumber Company, claimed a lien for lumber and mill work furnished on its contract with Crutchfield and made proof of its claim, but the court below found against it upon the theory that it was a sub-contractor and had not filed the notice of its lien required by law. A reference to our opinions in the other cases above referred to, will show that we are of opinion appellant and the other parties who furnished labor and material for the construction of the cottage in question, were not sub-contractors but original contractors and that therefore the notice provided to be given by sub-contractors, was not required of them.

Term No. 90. Opinion No. 20.

October Term, 1913.

East St. Louis Lumber Company,
Appellant,
vs.
H. J. Eggmann,
Appellee.

Appeal from the City Court of East St. Louis.

Opinion by Higbee, J.

This is one of three appeals from a decree entered in the city court of East St. Louis, upon petitions filed therein, to enforce a mechanics lien for labor and material furnished in the construction of a cottage erected on a lot in Hudson Place Lambdown, in addition to said city. The other suits in both of which opinions are filed, at the present term of this court, are Builders Supply and Coal Company against Eggmann and foreclosed against the same and in those opinions, will be found a full statement of the facts leading up to the construction of the cottage, the filing of the petitions and our views as to the questions of law, concerning the transaction.

The appellant in this case, East St. Louis Lumber Company, claimed a lien for lumber and mill work furnished on its contract with Crutchfield and made proof of its claim, but the court below found against it upon the theory that it was a sub-contractor and had not filed the notice of its lien required by law. A reference to our opinions in the other cases above referred to, will show that we are of opinion appellant and the other parties who furnished labor and material for the construction of the cottage in question, were not sub-contractors but original contractors and that therefore the notice provided to be given by sub-contractors, was not required of them.

It was claimedby appellee that the last of the material under this contract, was furnished on September 15, 1911, and that therefore the notice as sub-contractor, which was served by appellant upon appellee on December 2, 1911, was not given in time to comply with the law. We are of opinion, however, that the proofs show, as found by the master, that material was delivered on the premises by appellant, as late as January 20, 1912. This suit was commenced February 16, 1912, and was therefore well within the time required within which an original contractor may bring suit to enforce his lien.

It was also claimed by appellee and that view was apparently adopted by the court below, that the notice served on appellee and set out in appellant's petition, as a part thereof, claimed a balance of $815.13 when the amount should have been $654.66; that this excess in the claim constitutes a fraud in law which made the whole claim nugatory and void as against the owner. It appeared on the proofs that appellant had advanced some $160.47 to Crutchfield in the course of the work to pay mechanics and laborers working on the building and that, thinking he had a right to include the amount so paid in his claim for lien, he did so and that there was no attempt whatever on its part to perpetrate any fraud.

Section 7 of the Mechanics' lien law provides in reference to liens of this character "no such lien shall be defeated to the proper amount thereof, because of an error or over chargeing on the part of any person claiming a lien therefor, under this act, unless it shall be shown that such error or over charge is made with intent to defraud." See also authorities cited in Moorehead vs. Eggmann, supra. As there was no proof of fraud on the part of appellant in this regard, the lien for the amount rightfully due him cannot be defeated by reason of the erroneous item contained in the notice and petition.

It was claimed by appellee that the last of the material under this contract, was furnished on September 15, 1911, and that therefore the notice as sub-contractor, which was served by appellant upon appellee on December 2, 1911, was not given in time to comply with the law. We are of opinion, however, that the proofs show, as found by the master, that material was delivered on the premises by appellant, as late as January 20, 1912. This suit was commenced February 14, 1912, and was therefore well within the time required within which an original contractor may bring suit to enforce his lien.

It was also claimed by appellee and that view was apparently adopted by the court below, that the notice served on appellee and set out in appellant's petition, as a part thereof, claimed a balance of $815.15 when the amount should have been $654.66; that this excess in the claim constitutes a fraud in law which made the whole claim nugatory and void as against the owner. It appeared on the proofs that appellant had expended some $180.47 to Crutchfield in the course of the work to pay mechanics and laborers working on the building and that, thinking he had a right to include the amount so paid in his claim for lien, he did so and that there was no attempt whatever on his part to perpetrate any fraud.

Section 7 of the "Mechanics' Lien law provides in reference to liens of this character "no such lien shall be defeated to the proper amount thereof, because of an error or over charging on the part of any person claiming a lien therefor, under this act, unless it shall be shown that such error or over charge is made with intent to defraud." See also authorities cited in Moorehead vs. Bergman, Supra. As there was no proof of fraud on the part of appellant in this regard, the lien for the amount rightfully due him cannot be defeated by reason of the erroneous item contained in the notice and petition.

Under the proofs in this case the court below should have sustained the lien claimed by appellant and as it failed to do so that portion of the decree in this case which relates to appellant's claim, will be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and Remanded.

(Not to be reported in full.)

Under the proviso in this case the court below should have sustained the plea claimed by appellant and erred in failing to do so; for reasons of the decree in this case which relates to appellant's claim, will be reversed and the cause remanded for further proceedings in conformity with this opinion.

Reversed and Remanded.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 1st *day of May, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

NOINI

Rehearing Denied Oct 25, 1914

596

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S PAYNE, Sheriff*

159

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

Christian adm

vs.

Hunter

No. 44

March Term, 1914.

190 I.A. 596

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Bond COUNTY

TRIAL JUDGE

Hon. Geo A. Crow

Term No. 44. Agenda No. 37.

March Term, A. D. 1914.

Emma Belle Christian, Administratrix, Appellant,	
vs.	Appeal from Bond County Circuit Court.
Melvin C. Heuter, Appellee.	

Opinion by Higbee, P.J.

On March 4, 1912, George W. Christian, who was then engaged in operating a store at Greenville, Illinois, in partnership with Melvin C. Heuter, died, and shortly after his death, Emma Belle Christian, his widow, was appointed administratrix of his estate and duly qualified as such. On March 16, 1912, the surviving partner filed his inventory of the partnership assets in said estate and thereafter closed out the stock, part at retail and the rest together in one sale. In December, 1912, the administratrix filed a petition for a citation against appellee, asking that he be cited to show to the court what he had done towards settling the partnership and to give an account of its assets. Appellee answered the petition and afterwards made his report, showing the amounts received and the amounts paid out, from which it appeared that he had paid out $372,04 in excess of his receipts. Exceptions were filed by the administratrix to his report and upon the hearing the petition for citation was dismissed by the court. The administratrix appealed from the order dismissing the petition, claiming that the objections to appellee's report should have been sustained.

The most important matter referred to in appellant's objections and in dispute between the parties, grew out of the

Term No. 44. Agenda No. 37.

March Term, A. D. 1914.

Emma Belle Christian, Administratrix, Appellant,	
vs.	Appeal from Bond County Circuit Court.
Melvin C. Hunter,	
Appellee.	

Opinion by Higbee, P.J.

On March 4, 1912, George W. Christian, who was then engaged in operating a store at Greenville, Illinois, in partnership with Melvin C. Hunter, died, and shortly after his death, Emma Belle Christian, his widow, was appointed administratrix of his estate and duly qualified as such. On March 16, 1912, the surviving partner filed his inventory of the partnership assets in said estate and thereafter closed out the stock, part at retail and the rest together in one sale. In December, 1912, the administratrix filed a petition for a citation against appellee, asking that he be cited to show to the court what he had done towards settling the partnership and to give an account of its assets. Appellee answered the petition and afterwards made his report, showing the amounts received and the amounts paid out, from which it appeared that he had paid out $372.04 in excess of his receipts. Exceptions were filed by the administratrix to his report and upon the hearing the petition for citation was dismissed by the court. The administratrix appealed from the order dismissing the petition, claiming that the objections to appellee's report should have been sustained.

The most important matter referred to in appellant's objections and in dispute between the parties, grew out of the

following facts: On January 29, 1912, the firm of Christian & Heuter gave a partnership note to the State Bank of Hoiles and Sons for $1,700.00, due thirty days after date, with seven per cent interest per annum from maturity. The note, including a power of attorney, was signed by the firm name of Christian and Heuter and below the partnership name were the names of George W. Christian and M. C. Heuter, the individual partners. On April 25, 1912, a judgment by confession was taken on this note against appellee, Melvin C. Heuter, for $1718.84 and costs. On June 14, 1912, out of the money received by appellee as surviving partner of said firm he paid $1131.02 on the note and took from the banking firm the following agreement:

$1,132.02. Greenville, Ill., June 14, 1912.

Whereas, it is represented to the undersigned by M. C. Heuter, surviving partner of the firm of Christian & Heuter, that the total assets of said copartnership estate, upon a careful estimate, are equal to only 65 per cent of the total indebtedness of said copartnership, and whereas the undersigned hold a judgment in the circuit court of Bond County, Illinois, by confession, against the said copartnership, which said judgment was entered on or about the 25th day of April, A. D. 1912, and it is desirous on the part of the said surviving partner, that the undersigned receive and accept 65 ~~pdf~~ cent of said judgment in settlement thereof at this time. Now, therefore, in consideration of the premises, and the payment by said surviving partner of the said sum of eleven hundred and thirty-one and 2 one hundredths ($1,131.02) the undersigned does hereby enter a release of said judgment, provided and conditioned, however, that if upon final settlement of said copartnership estate there should be a surplus remaining ~~of~~ in the hands of said surviving part-

following facts: On January 29, 1912, the firm of Christian & Heuter gave a partnership note to the State Bank of Hollen and Como for $1,700.00, due thirty days after date, with seven per cent interest per annum from maturity. The note, including a power of attorney, was signed by the firm name of Christian and Heuter and below the partnership name were the names of George W. Christian and M. C. Heuter, the individual partners. On April 25, 1912, a judgment by confession was taken on this note against appellee, Melvin C. Heuter, for $1718.84 and costs. On June 14, 1912, out of the money received by appellee as surviving partner of said firm he paid $1131.02 on the note and took from the banking firm the following agreement:

$1,132.02. Greenville, Ill., June 14, 1912.

Thereon, it is represented to the undersigned by M. C. Heuter, surviving partner of the firm of Christian & Heuter, that the total assets of said copartnership exists, upon a careful estimate, are equal to 65 per cent of the total indebtedness of said copartnership, and whereas the undersigned had a judgment in the circuit court of Bond County, Illinois, by confession, against the said copartnership, which said judgment was entered on or about the 25th day of April, A. D. 1912, and it is desirous on the part of the said surviving partner, that the undersigned receive and accept 65 per cent of said judgment in settlement thereof at this time. Now, therefore, in consideration of the premises, and the payment by said surviving partner of the said sum of eleven hundred and thirty-one and 2 one hundredths ($1,131.02) the undersigned does hereby enter a release of said judgment, provided and conditioned, however, that if upon final settlement of said copartnership estate there should be a surplus remaining in the hands of said surviving part-

ner, available for the payment of debts owing by the said co-partnership, then in that event said surplus so remainign, if any, is to be applied upon the unpaid balance so due the undersigned.

(Signed) State Bank of Hoiles & Sons,

By G. B. Hoyles, Cashier."

It appears from appellee's report that he received as assets of the partnership, $3369.87 and paid out for other debts than the balance on said note, $3132.51, leaving a surplus in his hands of $237.36; that on October 26, 1912, he also paid said State Bank of Hoiles & Sons the sum of $609.40 in full of said judgment, making the total amount paid out by him $3741.91, which required $372.04 more than the amount of the assets collected by him. It is the contention of appellant that the partnership note having been reduced to judgment against appellee alone, the indebtedness expressed in the note, merged into the judgment and thereafter was not a claim against the partnership, but an individual debt of Heuter which could not be paid out of the firm assets. With this theory of appellant we do not agree. Section 88 of Chap. 3 of our Revised Statutes, provides, thath the surviving partner shall have the right to continue in possession of the effects of the partnership, pay its debts out of the same and settle its business and to proceed thereto without delay, and shall account with the administrator and pay over such balances as may from time to time have been payable to the latter in the right of his intestate. It was therefore the duty of appellee, under the statute, to take charge of the property of the partnership, collect its assets and pay the partnership debts. There is no contention

ner, available for the payment of debts owing by the said co-partnership, then in that event said surplus so remaining, if any, is to be applied upon the unpaid balance so due the undersigned.

(Signed) State Bank of Holice & Sons,

By J. Dupree, Cashier.

It appears from appellee's report that he received as assets of the partnership, $2369.87 and paid out for other debts than the balance on said note, $2132.31, leaving a surplus in his hands of $237.56; that on October 26, 1912, he also paid said State Bank of Holice & Sons the sum of $609.40 in full of said judgment, making the total amount paid out by him $2741.91, which required $372.04 more than the amount of the assets collected by him. It is the contention of appellee that the partnership note having been reduced to judgment against appellee alone, the indebtedness expressed in the note, merged into the judgment and thereafter was not a claim against the partnership, but an individual debt of Hunter which could not be paid out of the firm assets. With this theory of appellant we do not agree. Section 88 of Chap. 3 of our Revised Statutes, provides, that the surviving partner shall have the right to continue in possession of the effects of the partnership, pay its debts out of the same and settle its business and to proceed thereto without delay, and shall account with the administrator and pay over such balances as may from time to time have been payable to the latter in the right of his intestate. It therefore the duty of appellee, under the statute, to take charge of the property of the partnership, collect its ~~debts~~ assets and pay the partnership debts. There is no contention

but that the note in question was a partnership debt and was given during the life of both parties. After the death of Christian, appellee represented the partnership and the judgment on the note for the partnership debt, was properly taken by virtue of the confession contained therein against him. Upon that judgment an execution would have been properly issued and levied upon the partnership property. Bauer Grocery Co. v. McKee Shoe Co., 87 Ill. App., 434.

It is claimed by appellant that appellee continued to carry on the business and that he had no right to do so. We find from the proofs however, that no business was done by him other than selling the firm property and collecting the accounts. He sold the goodsfor a short time, not to exceed sixty days, at retail and then sold the balance in gross and nothing appears to show that this course was not for the best interests of the partnership. The contract made by appellee with the Hoiles bank was a reasonable one which he had a right to make. Under it he could properly pay any surplus remaining in his hands available for the payment of copartnership debts, necessary to discharge the judgment of the bank in full. The fact that appellee paid $372,04 more on the debts of the firm, including the bank note, than came to his hands as assets, cannot properly concern or be objected to by appellant, as no claim for any part thereof appears to have been allowed, even if it can be properly said to have been made, against appellant as administratrix of said estate.

In this connection it is insisted that the payment made to the bank of the balance of their debt after they had receipted for 65 per cent, was a fraud perpetrated upon the creditors and

but that the note in question was a partnership debt and was given during the life of both parties. After the death of Christian, appellee represented the partnership and the judgment on the note for the partnership debt, was properly taken by virtue of the confession contained therein against him. Upon that judgment an execution could have been properly issued and levied upon the partnership property. Bauer Grocery Co. v. Kokee Shoe Co., 87 Ill. App., 424.

It is claimed by appellant that appellee continued to carry on the business and that he had no right to do so. We find from the proofs however, that no business was done by him other than selling the firm property and collecting the accounts. He sold the goodwill a short time, not to exceed sixty days, at retail and then sold the balance in gross and nothing appears to show that this course was not for the best interests of the partnership. The contract made by appellee with the Hollis bank was a reasonable one which he had a right to make. Under it he could properly pay any surplus remaining in his hands available for the payment of copartnership debts, necessary to discharge the judgment of the bank in full. The fact that appellee paid $372.04 more on the debts of the firm, including the bank note, than came to his hands as assets, cannot properly concern or be objected to by appellant, as no claim for any part thereof appears to have been allowed, even if it can be properly said to have been made, against appellant as administratrix of said estate.

In this connection it is insisted that the payment made to the bank of the balance of their debt after they had receipted for 65 per cent, was a fraud perpetrated upon the creditors and

that the widow of the deceased, being a creditor of her husband's estate, has been defrauded in that transaction. But no creditor of the estate was entitled to any part of the partnership assets until the debts of the partnership were paid. The contract was simply to pay a debt of the partnership and as we have seen, the payment was made in accordance with the law as well as good business and personal integrity.

Appellant claims there were discrepancies in some of the smaller items of the account filed by appellee, but the evidence does not appear to clearly sustain that claim. We find from the record that appellee has fairly accounted for the partnership assets and the funds derived therefrom seem to have been properly expended. The order of the court below dismissing the petition for citation against appellee, will therefore be affirmed.

Affirmed.

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(Not to be reported in full.)

that the widow of the deceased, being a creditor of her husband's estate, has been defrauded in that transaction. But no creditor of the estate was entitled to any part of the partnership assets until the debts of the partnership were paid. The contract was simply to pay a debt of the partnership and as we have seen, the payment was made in accordance with the law as well as good business and personal integrity.

Appellee claims there were discrepancies in some of the smaller items of the account filed by appellee, but the evidence does not appear to clearly sustain that claim. We find from the record that appellee has fairly accounted for the partnership assets and the funds derived therefrom seem to have been properly expended. The order of the court below dismissing the petition for citation against appellee, will therefore be affirmed.

Affirmed.

****

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

NOINIc

Rehearing Denied Oct 28 1914

597

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

190

190 I.A. 597

Nabb
adm'x

vs.

No. 61

March Term, 1914.

Hunt

~~ERROR TO~~
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

Hon. W. E. Hadley.

Term No. 61. Agenda No. 43.

March Term, A. D. 1914.

Allie Webb, Administratrix, Appellee,	
v.	Appeal from St. Clair.
A. A. Hunt, Appellant.	

Opinion by Higbee, P.J.

This is a suit in assumpsit brought by Allie Webb, administratrix of the estate of Reese Webb, deceased for $300 alleged to have been received for said estate by A.A.Hunt, appellant. At the conclusion of all the evidence, the court instructed the jury to return a verdict for appellee for $293, and the jury having done so, judgment was entered on the verdict for that amount. Appellant complains here that the court erred in directing a verdict for the administratrix for said amount as under the proofs she was not entitled to recover.

The following facts were shown by the proofs: On February 17,1913, Reese Webb was killed by his wife Allie Webb in self defense. At the time of his death, deceased was a partner with Ike Williams in running a saloon in East St.Louis. Shortly afterwards Allie Webb called upon appellant, who was an attorney in regard to settling her husband's estate. He advised her it could be settled without going into court and she xxx employed him to look after the matter. After consultation with Williams and his client appellant sold the interest Webb had held in the saloon to his partner Ike Williams for $300 and that amount was paid over to him. It also appeared that appellant

Term No. 61. Agenda No. 42.

March Term, A. D. 1914.

Allie Webb, Administratrix, Appellee.	
V.	Appeal from St. Clair.
A. A. Hunt, Appellant.	

Opinion by Higbee, P.J.

This is a suit in assumpsit brought by Allie Webb, administratrix of the estate of Reese Webb, deceased for $800 alleged to have been received for said estate by A.A.Hunt, appellant. At the conclusion of all the evidence, the court instructed the jury to return a verdict for appellee for $293, and the jury having done so, judgment was entered on the verdict for that amount. Appellant complains here that the court erred in directing a verdict for the administratrix for said amount as under the proofs she was not entitled to recover.

The following facts were shown by the proofs: On February 17,1913, Reese Webb was killed by his wife Allie Webb in self defense. At the time of his death, deceased was a partner with Ike Williams in running a saloon in East St.Louis. Shortly afterwards Allie Webb called upon appellant, who was an attorney in regard to settling her husband's estate. He advised her it could be settled without going into court and she was employed him to look after the matter. After consultation with Williams and his client appellant sold the interest Webb had held in the saloon to his partner Ike Williams for $800 and that amount was paid over to him. It also appeared that appellant

received a pair of diamond ear rings and a toilet set, the former of which she said were worth $25 and the latter $9, but against which there was a debt of $15.50. Appellee called upon appellant several times for the $300, but the latter refused to pay the whole amount, claiming he was to deduct therefrom $100 for attorney's fees, and also pay the funeral expenses of the deceased and $7 to one McCullough. Afterwards she took out letters of administration on her husband's estate and brought this suit to recover the $300 paid appellant for her husband's interest in the partnership. There was a conflict in the testimony as to the amount to be paid as attorney's fees, and also as to whether appellee agreed that the same should be deducted from the $300. Appellant also testified he had paid $50 on the undertaker's bill, by giving the firm of undertakers credit for that amount on the bill he held against them, and had paid McCullough's bill of $7, which latter appears to have been allowed him by the verdict of the jury.

There was no plea of set off filed and such matters as otherwise might be the subject of set off or counterclaim, could not be availed of by appellant in this suit in any event. Whatever the personal agreement may have been between Allie Webb and appellant concerning the fee to be paid by her to him, that agreement could not bind her as administratrix of the estate. Upon the appointment of Allie Webb, as administratrix, the title to the personal property of her deceased husband vested in her, as such administratrix, at once by operation of law. She could not personally in her own name bring suit against appellant or any one else for the property which had belonged to the deceased but the right of recovery was in the administratrix alone, and she held the title to the property for

received a pair of diamond ear rings and a toilet set, the former of which she said were worth $25 and the latter $3, but against which there was a debt of $12.50. Appellee called upon appellant several times for the $300, but the latter refused to pay the whole amount, claiming he was to deduct therefrom $100 for attorney's fees, and also pay the funeral expenses of the deceased and $7 to one McCullough. Afterwards she took out letters of administration on her husband's estate and brought this suit to recover the $300 paid appellant for her husband's interest in the partnership. There was a conflict in the testimony as to the amount to be paid as attorney's fees, and also as to whether appellee agreed that the same should be deducted from the $300. Appellant also testified he had paid $50 on the undertaker's bill, by giving the firm of undertakers credit for that amount on the bill he held against them, and had paid McCullough's bill of $7, which latter appears to have been allowed him by the verdict of the jury.

There was no plea of set off filed and such matters as otherwise might be the subject of set off or counterclaim, could not be availed of by appellant in this suit in any event. Whatever the personal agreement may have been between Allie Webb and appellant concerning the fee to be paid by her to him, that agreement could not bind her as administratrix of the estate. Upon the appointment of Allie Webb, as administratrix, the title to the personal property of her deceased husband vested in her, as such administratrix, at once by operation of law. She could not personally in her own name bring suit against appellant or any one else for the property which had belonged to the deceased but the right of recovery was in the administratrix alone, and she held the title to the property for

distribution among those entitled thereto under the law. Thornton v. Mehring 117, Ill.55.

Appellant insists that even in her official capacity as administratrix, appellee cannot sue him but must first compel an accounting by the surviving partner. We do not consider this position well founded for the reason that appellant undertook to settle with the surviving partner for the interest of the deceased in the business and received money therefor and appellee as administratrix is willing to abide by that settlement and take the money received by appellant as the interest of said estate in the partnership instead of compelling an accounting by law or otherwise by the surviving partner. Whatever other rights appellee may have as administratrix, the fact remains that as appellant received money belonging to the estate of her deceased husband, she has the right as administratrix to sue him and recover the amount of the same for the estate.

The court below properly directed the jury to find the issues for appellee and the judgment, based on the verdict, returned in compliance with such order, will be affirmed.

********** Affirmed.

(Not to be reported in full).

distribution among those entitled thereto under the law.

Thornton v. Mohring 117, 111.86.

Appellant insists that even in her official capacity as administratrix, appellee cannot sue him but must first account an accounting by the surviving partner. We do not consider this position well founded for the reason that appellant undertook to settle with the surviving partner for the interest of the deceased in the business and received money therefor and appellee as administratrix is willing to abide by that settlement and take the money received by appellant as the interest of said estate in the partnership instead of compelling an accounting by law or otherwise by the surviving partner. Whatever other rights appellee may have as administratrix, the fact remains that as appellant received money belonging to the estate of her deceased husband, she has the right as administratrix to sue him and recover the amount of the same for the estate.

The court below properly directed the jury to find the issues for appellee and the judgment, based on the verdict, returned in compliance with such order, will be affirmed.

Affirmed.

(Not to be reported in full).

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

NOINI

Hearing Denied Oct 21 1914

A 579

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff*

161

And afterwards in Vacation, after said March term, to-wit: On the 28th *day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:*

190 I.A. 599

Gibson

vs.

No. 46

October Term, 1913.

Masson Coal Co

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Saline COUNTY

TRIAL JUDGE

Hon. A. N. Lewis.

Term No. 46. Agenda No. 28.

October Term, A. D. 1913.

Charles Gibson, Appellee, vs. Wasson Coal Company, Appellant.	Appeal from the Circuit Court of Saline County.

Opinion by Harris, J.

The four counts of the amended declaration in this case charge appellant with violation of its duty under the Mining Act of the State of Illinois, in substance, as follows:

That on the 24th day of October, 1910, appellant was operating a coal mine in the County of Saline in which there were entries and one entry in particular being the second north entry off of the main east entry; that appellee was employed by appellant in said mine as a machine runner, operating a machine undercutting coal in said entry. That it was the duty of appellant to employ a competent mine examiner and cause him to visit said mine and make a careful examination of all places where appellee was expected to pass or work, observe whether there were any unsafe conditions in the rooms or roadways, and when any unsafe condition was observed in a working place to place a conspicuous mark thereat as notice to all men to keep out, and report his findings to the mine manager; said examination to be made each morning before permitting the men to enter the mine to work therein.

That on said day appellee was running a machine in the

Term No. 40. Agenda No. 20.

October Term, A. D. 1912.

Charles Gibson, Appellee, vs. Sesson Coal Company, Appellant.	Appeal from the Circuit Court of Saline County.

Opinion by Hartle, J.

The four counts of the amended declaration in this case charge appellant with violation of its duty under the Mining Act of the State of Illinois, in substance, as follows:

That on the 24th day of October, 1910, appellant was operating a coal mine in the County of Saline in which there were entries and one entry in particular being the second north entry off of the main east entry; that appellee was employed by appellant in said mine as a machine runner, operating a machine undercutting coal in said entry. That it was the duty of appellant to employ a competent mine examiner and cause him to visit said mine and make a careful examination of all places where appellee was expected to pass or work, observe whether there were any unsafe conditions in the rooms or roadways, and when any unsafe condition was observed in a working place to place a conspicuous mark thereat as notice to all men to keep out, and report his findings to the mine manager; said examination to be made each morning before permitting the men to enter the mine to work therein.

That on said day appellee was running a machine in the

said entry, and therein was a pile of gob four feet wide, three feet high, extending from the right rail of the track in said entry to the right rib of coal, located about eight feet from face of the coal; that said gob formed an unsafe condition in appellee's working place in that lumps of coal could roll therefrom into the frame of said machine, and also by reason of its being located so near the face of the coal as not to leave a clear space sufficient between the pile of gob and the face of the coal for the reasonably ~~xxxxxxxxx~~ safe operation of said machine; that said unsafe condition could have been discovered by said mine examiner upon a reasonably careful examination on the morning of the day of the injury.

That appellant wilfully failed to cause said examiner to visit and inspect appellee's said working place and observe said unsafe condition and place a conspicuous mark thereat as a notice to plaintiff to keep out, and report his findings to mine manager, and make a daily report in a book for that purpose. That appellant failed to cause the mine manager to visit and examine said working place on that morning or as often as practicable for some time prior thereto and failed to see that said dangerous place was properly marked and danger signals displayed thereat.

That while the appellee was operating the machine at his working place in the usual course of his employment on the day aforesaid by reason of appellant's wilful failure aforesaid a lump of coal rolled off of said pile of gob into and through the frame of said machine and came in contact with appellant's foot, threw him against and into the bite of said machine, and his leg was cut off about four inches below the knee and otherwise injuring him and alleging damages in the amount of $15000.00.

said entry, and therein was a pile of gob four feet wide, three feet high, extending from the right rail of the track to said entry to the right rib of coal, located about eight feet from face of the coal; that said gob formed an unsafe condition in appellee's working place in that lumps of coal could roll therefrom into the frame of said machine, and also by reason of its being located so near the face of the coal as not to leave a clear space sufficient between the pile of gob and the face of the coal for the reasonably expectant safe operation of said machine; that said unsafe condition could have been discovered by said mine examiner upon a reasonably careful examination on the morning of the day of the injury.

That appellant wilfully failed to cause said examiner to visit and inspect appellee's said working place and observe said unsafe condition and place a conspicuous mark thereat as a notice to plaintiff to keep out, and report his findings to mine manager, and make a daily report in a book for that purpose. That appellant failed to cause the mine manager to visit and examine said working place on that morning or as often as practicable for some time prior thereto and failed to see that said dangerous place was properly marked and danger signals displayed thereat.

That while the appellee was operating the machine at his working place in the usual course of his employment on the day aforesaid by reason of appellant's wilful failure aforesaid a lump of coal rolled off of said pile of gob into and through the frame of said machine and came in contact with appellant's foot, threw him against and into the side of said machine, and his leg was cut off about four inches below the knee and otherwise injuring him and alleging damages in the amount of $15,000.

To these four counts the plea of general issue was filed, a trial had, verdict of jury for appellee, damages $1350, judgment on verdict from which this appeal is prosecuted.

Appellant contends that under the evidence in this case it has violated no statutory duty, and if the Court should find to the contrary, that there is no evidence in the record tending to show that such violation was the proximate cause of the injury, upon this contention the rights of the parties are to be determined.

In passing to the question of the proximate cause of the injury and before entering upon the facts in connection therewith we will refer to Section 21, Paragraph 4 of the Mining Statute of the State of Illinois, wherein, among other things, its is provided that: "It is the duty of the mine examiner to inspect all places where men are required in the performance of their duty to pass or to work and to observe whether there are any recent falls, dangerous roof, accumulations of gas or dangerous obstructions in rooms or roadways, etc."

While it is admitted by counsel for appellant in their argument before this court that whether or not the appellant failed to perform its statutory duty through its mine examiner is immaterial, because there is a total failure from the evidence to show that the failure to perform such statutory duty was the proximate cause of the injury. As a basis for considering the testimony we submit that there was a duty under the mining statute for it to perform through the mine examiner with reference to the place in question and that under the evidence in this case as to whether there was a violation of that statutory duty as alleged in one or more of

To these four counts the plea of general issue was filed, a trial had, verdict of jury for $2,000 damages, judgment on verdict from which this appeal is prosecuted.

Appellant contends that under the evidence in this case it has violated no statutory duty, and if the Court should find to the contrary that there is no evidence in the record tending to show that such violation was the proximate cause of the injury, upon this contention the rights of the parties are to be determined.

In passing to the question of the proximate cause of the injury and before entering upon the facts in connection therewith we will refer to Section 21, Paragraph 4 of the Mining Statute of the State of Illinois, wherein, among other things, it is provided that: "It is the duty of the mine examiner to inspect all places where men are required in the performance of their duty to pass or to work and to observe whether there are any recent falls, dangerous roof, accumulations of gas or dangerous obstructions in rooms or roadways, etc."

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the four counts of the declaration was properly submitted to the jury as a question of fact, and their finding thereon can not be seriously controverted.

The same rule of law is binding upon the Court in submitting or refusing to submit to the jury as a question of fact, whether the violation of the statute was the proximate cause of the injury as applies to any other material issue to be proven by appellee and if there is any evidence, more than a scintilla, to prove the issue it is the duty of the trial court to submit this issue to the jury. Appellant upon this proposition says: The evidence shows that Gibson's accident was caused by his attempting to step over the machine and slipping upon the earth where water had stood and not by the rolling of the gob against his leg and pushing it into the machine. Appellant arrives at this conclusion from the physical conditions surrounding the place where the accident occurred and the statements of Gibson and his helper Ellenbaugh to Baker and H. M. Evans, respectively, on the day of the accident. The undisputed evidence as to the physical conditions at the place where the accident occurred was that appellee was directed by the Mine Manager Evans to cut the coal at the place in question, which was an entry about twelve feet wide with a railway track leading to the face of the coal. The left hand rail was about two and one-half feet from the left rib of coal and the right rail about five feet from the right rib of coal; the rails about 42 inches apart. The gob, being the waste, coal, slate and sulphur, was piled up at the right rib of the coal about three feet high and gradually

the four counts of the declaration was properly submitted to the jury as a question of fact, and their finding thereon can not be seriously controverted.

The same rule of law is binding upon the Court in submitting or refusing to submit to the jury as a question of fact, whether the violation of the statute was the proximate cause of the injury as applies to any other material issue to be proven by appellee and if there is any evidence, more than a scintilla, to prove the issue it is the duty of the trial court to submit this issue to the jury. Appellant upon this proposition says: The evidence shows that Gibson's accident was caused by his attempting to step over the machine and slipping upon the earth where water had stood and not by the rolling of the cob against his leg and walking in into the machine. Appellant arrives at this conclusion from the physical conditions surrounding the place where the accident occurred and the statements of Gibson and his helper Kilmenbugh to Baker and H. M. Evans, respectively, on the day of the accident. The undisputed evidence as to the physical conditions at the place where the accident occurred was that appellee was directed by the Mine Manager Evans to cut the coal at the place in question, which was an entry about twelve feet wide with a rail by track leading to the face of the coal. The left hand rail was about 1 0 and one-half feet from the left rib of coal and the right rail about five feet from the right rib of coal; the rails about 42 inches apart. The cob, being the waste, coal, slate and sulphur, was piled up at the right rib of the coal about three feet high and gradually

went down to a half foot next to the rail and came to within ten to twelve inches of the right rail. There was a foot or so of water in this entry up to the Saturday before the accident and at that time the water was pumped out leaving the bottom damp and soft. The coal was four feet eight inches to five feet high. There was a gob pile on the left-hand side of the left rail which was not cribbed, and the gob on the right hand side was piled three to three and one-half feet above cribbing. When appellee went in there he saw the condition, set his machine, which machine is ten feet eight inches long and with the skids under it fifteen inches high. The pile of gob was about eight feet from face of coal. The clear space necessary to operate the machine was about twelve feet. The place for starting machine was on right-hand side.

Some of the disputed facts with reference to the accident as appeared from the evidence are, as follows: Appellee says he was standing on the left-hand side of the machine. The cable was on the gob, he went to step over and the gob slipped down and appellee went into the back end of the machine. It took his leg around until it struck the middle piece in the machine, and his foot was cut off. There was no mine manager's mark on this gob or coal at the time, no date marks of the mine examiner on the walls of the room. The gob was right down against the back end of the machine.

The helper Ellenbaugh says: "My buddy, Charles Gibson was working on back end of machine and in second north entry. He went to step over the machine and slipped on some gob or rock and fell and his foot or ankle was caught by the chain and bits." These were the only eye witnesses to accident.

went down to a half foot next to the wall and came to within ten to twelve inches of the right wall. There was a foot or so of water in this entry up to the Saturday before the accident and at that time the water was pumped out leaving the bottom damp and soft. The coal was four feet eight inches to five feet high. There was a gob pile on the left-hand side of the left wall which was not cribbed, and the gob on the right hand side was piled three to three and one-half feet above cribbing. When Appelles went in there on the condition, set his machine, which machine is ten feet eight inches long and with the slide under it fifteen inches high. The pile of gob was about eight feet from face of coal. The clear space necessary to operate the machine was about five feet. The place for starting machine was on right-hand side.

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The helper Kilmenkey says: "My buddy, Charles Gibson was working on back end of machine and in second north entry. He went to step over the machine and slipped on some gob or rock and fell and his foot or ankle was caught by the chain and bite." These were the only eye witnesses to accident.

According to Witness Baker in the statement made by Gibson, he says, that Gibson said on the day of the injury: "That he went to step across the machine to keep the cable off of the bits and slipped and fell and the machine bit caught his leg."

Evans prepared a statement the next day after the accident which was signed by Ellenbaugh which is as above quoted.

It is contended by appellant from this statement of fact and statements of the two eye witnesses out of court that the Court should have taken such statements out of court with the physical conditions as the truth and given the peremptory instruction on the ground that the pile of gob was not a dangerous condition and not the proximate cause of the injury.

It is elementary that statements made by witnesses out of court inconsistent with their evidence upon any material matter may be introduced on the trial for the purpose of contradicting their evidence and going to their credibility as witnesses, which it is the duty of the jury to determine from all the evidence in the case.

It is not for the court, upon a motion of this kind, to weigh the evidence and determine where the preponderance lies. If there is any evidence, with all the legal inference that may be drawn from it that standing alone would support a verdict, it is a question of fact for the jury and not a question of law for the Court. When you lay aside the weighing of the testimony, the contributory negligence of appellee, the assumption of risk by appellee as we are

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It is not for the court, upon a motion of this kind, to weigh the evidence and determine where the preponderance lies. If there is any evidence, with all the legal inference that may be drawn from it that standing alone would support a verdict, it is a question of fact for the jury and not a question of law for the Court. When you lay aside the weighing of the testimony, the contributory negligence of appellee, the assumption of risk by appellee as we are

compelled to do under the law, there was evidence of there being a dangerous condition at the place where appellee was requested to work, the violation of a statutory duty, and that violation being the direct and proximate cause of appellee's injury, and the motion to instruct the jury was properly overruled. There being a contariety of evidence upon these issues we think the evidence sufficient to support the verdict and we are unable to say it is against the manifest weight thereof.

Appellant contends that it was error for the Court to refuse to prevent Witness Gahagan, mine examiner, to answer the following question propounded by appellant: "Tell the jury now what condition you found that entry in as to being safe or otherwise?" It is admitted the question called for the opinion of the witness as a person above all others who ought to know its condition. It may be that appellant insisted upon this alleged error as following the holding of the Court in case of Kellyville Coal Co. vs String, 217 Ill., 531, where the Court held that a miner's evidence was admissible to show when a piece of work had been properly or improperly done but the same opinion distinguishes between that kind of evidence and an answer of the witness that the entry was safe or unsafe; and in the case of Aetitus vs Spring Valley Coal Co., 246 Ill., 39, the Court says: "That the mine owner cannot excuse himself because he, his examiner or manager may think the mine safe. To so hold would be to permit the mine owner, examiner or manager to usurp the functions of court and jury and pass upon a question which is a matter of proof and is to be determined as a fact by the jury."

Under the authorities the Court properly sustained

compelled to do under the law, there was evidence of there being a dangerous condition at the place where Mr. Allee was requested to work, the violation of a statutory duty, and that violation being the direct and proximate cause of Mr. Allee's injury, and the motion to instruct the jury was properly overruled. There being a conflict of evidence upon these issues we think the evidence sufficient to support the verdict and we are unable to say it is against the manifest weight thereof.

Appellant contends that it was error for the Court to refuse to prevent Witness Cameron, mine examiner, to answer the following question propounded by appellant: "Tell the jury what that condition you found that entry in as to being safe or other wise?" It is admitted the question called for the opinion of the witness as a person above all others competent to know its condition. It may be that appellant intended upon this alleged error as following the opinion of the Court in case of Kellyville Coal Co. vs Strine, 217 Ill., 321, where the Court held that a miner's evidence was admissible to show when a piece of work had been properly or improperly done but the same opinion distinguishes between that kind of evidence and an answer of the witness that the entry was safe or unsafe; and in the case of Aetna vs Spring Valley Coal Co., 246 Ill., 36, the Court says: "That the mine owner cannot excuse himself because he, his examiner or manager may think the mine safe. To so hold would be to permit the mine owner, examiner or manager to usurp the functions of court and jury and pass upon a question which is a matter of proof and is to be determined as a fact by the jury."

Under the authorities the Court properly sustained

the objection to the question to Witness Gahagan. Appellant assigns numerous errors to the giving and modifying by the court of instructions. As to the giving of appellee's instruction No. 2, this instruction is not subject to the criticism in the case of Weber vs Blackman, 161 App., 53, cited by appellant in this that the word "wilfully" was omitted in the case cited. There is no other reason given by appellant why this instruction is fatally defective except that it is almost like the one in the case cited. Appellant's given instruction upon the same subject matter certainly closes all objections to this instruction.

The objection to appellee's given instructions 3, 5 and 7 is not well taken when considered with appellant's given instructions 2, 3 and 5. The jury could not have been misled by them and as they did not call for a finding there was no reversible error.

The objection as to appellee's given instruction No. 8 when considered with appellant's instruction No. 6 is not reversible error.

The objection of appellant to appellee's given instructions 10, 11, 16 and 17 were covered by appellant's given instructions upon the same propositions and did appellant no harm.

The objection of appellant to the modification of its instruction is without merit, in most instances striking out the word "direct" and inserting the word "proximate". The words "direct" and "proximate" under the authorities have been considered. "There may be several substantive causes of an accident, but, if one which is proximately connected

the objection to the question to Witness Gahagan. Appellant assigns numerous errors to the giving and modifying by the court of instructions. As to the giving of appellee's instruction No. 2, this instruction is not subject to the criticism in the case of Sabet vs Blackman, 101 App., 69, cited by appellant in this that the word "illegally" was omitted in the case cited. There is no other reason given by appellant by this instruction is legally defective except that it is almost like the one in the case cited. Appellant's given instruction upon the same subject matter certainly covers all objections to this instruction.

The objection to appellee's given instructions 3, 5 and 7 is not well taken when considered with appellant's given instructions 2, 3 and 5. The jury could not have been misled by them and as they did not call for a finding there is no reversible error.

The objection as to appellee's given instruction No. 3 but considered with appellant's instruction No. 7 is not reversible error.

The objection of appellant to appellee's given instructions 10, 11, 16 and 17 were covered by appellant's given instructions upon the same propositions and did appellant no harm.

The objection of appellant to the modification of its instruction is without merit, in most instances striking out the word "direct" and inserting the word "proximate". The words "direct" and "proximate" under the authorities have been considered. "There may be several substantive causes of an accident, but, if one which is proximately connected

with it is proven, it is sufficient." (Chicago Terminal Co. vs Schmelling, 197 Ill., 630). The word "direct" might give the jury to understand the court to say first in point of time, and the word "proximate" mostfrequently used when instructing juries. Appellant in this particular case has in its given instructions 16, 17 and 18 used the word direct and had the benefit thereof.

The modification by the Court of appellant's instructions 14, 17, 18, 19 and 20 were not prejudicial to appellant's theory of the case, and gave all the law to the jury that appellant was entitled to when the twenty-three instructions given for appellant are considered as a series.

We find no reversible error in the trial of this case and the judgment will be affirmed.

Affirmed.

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(Not to be reported in full.)

says it is proven, it is sufficient." (Chicago Terminal Co. vs Schmeiling, 197 Ill., 630). The word "direct" at the give the jury to understand the court is only first in point of time, and the word "proximate" mostfrequently used when instructing juries. Appellant in this particular case has in its given instructions 16, 17 and 18 used the word direct and has the benefit thereof.

The modification by the Court of appellant's instructions 14, 17, 18, 19 and 20 were not prejudicial to appellant's theory of the case, and gave all the law to the jury that appellant was entitled to when the twenty-three instructions given for appellant are considered as a series.

We find no reversible error in the trial of this case and the judgment will be affirmed.

Affirmed.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

NOIN

Opinion Filed Oct 25 1914

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. W. S. PAYNE, Sheriff

162

And afterwards in Vacation, after said March term, to-wit: On the 25th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

190 I.A. 602

Sykes

vs.

No. 50

March Term, 1914.

Big Muddy Coal & Iron Co

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Jackson. COUNTY

TRIAL JUDGE

Hon. A. N. Lewis.

Term No. 50. Agenda No. 44.

March Term, A. D. 1914.

Joseph Synkus, Appellee, vs. Big Muddy Coal & Iron Company, Appellant.	Appeal from Circuit Court of Jackson County.

Opinion by Harris, J.

The appellee brought this action in case against appellant for injuries received April 23, 1913, and filed a declaration consisting of five counts. The jury were instructed to find appellant not guilty under third, fourth and fifth counts. The case was submitted to jury on the first and second counts of the declaration and returned a verdict in favor of appellee for sum of $3,000.00, upon which court entered judgment and this appeal. The first count of the declaration was count based upon a violation of Section 24B of the mining act and after the formal averments alleges that appellee was ordered by appellant to advance his working place toward said abandoned room which he did until a hole or crack was made from his working place into said agandoned place into said room which permitted gas from said abandoned room to enter his working place; that the appellant contrary to the statute wilfully failed to maintain in advance of the face of appellee's working place a bore hole not less than ten feet in depth, and one hole in each rib of his working place, ten feet in depth, which side holes were to be drilled so as to make an angle of not less than 45 degrees with the direction of the rib, as his working place approached said abandoned room filled with explosive gas; that appellant wilfully permitted

Term No. 80. Agenda No. 44.

March Term, A. D. 1914.

Joseph Synkus, Appellee, vs. Big Muddy Coal & Iron Company, Appellant.	Appeal from Circuit Court of Jackson County.

Opinion by Harris.

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the appellee's working place to be driven within two feet of said explosive gas or until an opening or crack was made between his working place and said abandoned room, without said bore holes being maintained in the face and the sides of his working place; that appellee had no knowledge that gas was entering his working place from said abandoned room and that if said bore holes had been made as required by the statute the appellee could have knowledge of the close proximity of said gas before enough of said gas had escaped to cause an explosion by reason of such wilful failure, etc., enough of said gas escaped from said abandoned room into appellee's working place became ignited and caused an explosion injuring appellee, etc.

The second count a common law count avvering an unsafe place to work, a negligent order given by appellant's foreman in charge, a reliance upon the promise made by foreman of want of danger, obedience by appellee to order without knowledge of danger, a reliance upon duty of appellant to furnish safe place to work, escaping of gas, explosion and injury by reason of appellant ordering appellee to proceed in driving his working place toward said abandoned room. The formal allegations. Both counts allege that appellant had rejected the terms and provisions of the compensation act.

To this declaration appellant filed the general issue, a trial verdict in favor of appellee for $3,000.00. Motion for new trial overruled, judgment and this appeal.

The appellee was on the 23rd day of April, 1913, working as a miner about 140 feet from the last open cross cut between rooms 60 and 61 on the 2nd southeast entry and the face of room sixty. That appellee was at time of injury about 22 years of age, was working on day of injury April 23, 1913, in room 61 and in cross cut in that room on 3rd southeast entry, the cross cut was about

the appellee's working place to be driven within two feet of said explosive gas or until an opening or crack was made between his working place and said abandoned room, without said bore holes being maintained in the face and the sides of his working place; that appellee had no knowledge that gas was entering his working place from said abandoned room and that if said bore holes had been made as required by the statute the appellee could have knowledge of the close proximity of said gas before enough of said gas had escaped to cause an explosion by reason of such willful failure, etc., enough of said gas escaped from said abandoned room into appellee's working place became ignited and caused an explosion injuring appellee, etc.

The second count a common law count averring an unsafe place to work, a negligent order given by appellant's foreman in charge, a reliance upon the promise made by foreman of work of danger, obedience by appellee to order without knowledge of danger, a reliance upon duty of appellant to furnish safe place to work, escaping of gas, explosion and injury by reason of appellant ordering appellee to proceed in driving his working place toward said abandoned room. The formal allegations, both counts allege that appellant had rejected the terms and provisions of the compensation act.

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The appellee was on the 23rd day of April, 1913, working as a miner about 140 feet from the last open cross cut between rooms 60 and 61 on the 2nd southwest entry and the face of room sixty. That appellee was at time of injury about 22 years of age. Was working on day of injury April 23, 1913, in room 61 and in cross cut in that room on 2nd southwest entry, the cross cut was about

0 feet from face of room; drilled the holes and shot the shot that knocked the coal down in the cross cut; appellee was loading coal from cross cut into car when gas got on fire and burned him about head, face and left arm from fingers to shoulder. He was earning when working $5.00 per day; before injury appellee had worked at mining three years and at appellant's mine about four months. The opening was intended to be cut between rooms 61, where appellee was working, and 62 off of 3rd southeast entry but old room 60 of 2nd southeast entry extended back far enough to and did catch it.

That about the 15th of April, 1913, Lot Lowery, one of the assistant mine managers, was at the place of injury and discovered that the opening was between rooms 61, 3rd southeast and 60 2nd southeast and did not find gas but did not get to face of room 60 because of heavy rock hanging over the room that was about to fall. Lowery and appellee and his brother say that Lowery told them to shoot down the coal but disagree in that Lowery says he told them to leave it until he could come back and appellee and his brother say he told them to shoot it down; that Lowery was a man of 27 years experience in mining.

The errors argued by appellant are:

First: That appellant was operating at time of injury under compensation law of 1911.

Second: That the Court should not have admitted the certified copies of letters and notices to Secretary of State of Illinois and to the State Bureau of Labor Statistics in regard to compensation act.

Third: That if appellant had rejected compensation act, it was not deprived of its common law defenses.

0 feet from face of room; drilled the holes and shot the shot that knocked the coal down in the crosscut; appellee was throwing coal from crosscut out into car when gas got on fire and burned his about head, face and left arm from fingers to shoulder. He was earning when working $3.00 per day; before injury respondent had worked at mining three years and at appellant's mine about four months. The opening was intended to be cut between rooms 61, where appellee was working, and 60 off of 3rd southeast entry but air room 60 of 2nd southeast entry extended back far enough to and did catch it.

That about the 15th of April, 1913, Ind Lowery, one of the assistant mine managers, was at the place of injury and testified that the opening was between rooms 61, 3rd southeast and 60 2nd southeast and did not find gas but did get to face of room 60 because of heavy rock hanging over the room that was about to fall. Lowery and appellee and his brother say that Lowery told them to shoot down the coal but disagree in that Lowery says he told them to leave it until he could come back and appellee and his brother say he told them to shoot it down; that Lowery was a man of 27 years experience in mining.

The errors argued by appellant are:

First: That appellant was operating at time of injury under compensation law of 1911.

Second: That the Court should not have admitted the certified copies of letters and notices to Secretary of State of Illinois and to the State Bureau of Labor Statistics in regard to compensation act.

Third: That if appellant had rejected compensation act, it was not deprived of its common law defenses.

Fourth: That court erred in instructing and refusing to instruct jury, and to admit proper evidence offered by appellant.

Under the first error argued a construction of the compensation act of 1911 with appellee's exhibit G a notice to Bureau of Labor Statistics of date December 22, 1911, and received and filed December 23, 1911, is involved.

First, a construction of the compensation act where a corporation coming under its provisions has filed notice rejedting its provisions although said notice was given more than one year previous to accident and not within 60 days of the beginning of year in which accident occurred. This alleged error is predicated upon the assumption by appellant that it was operating its mine at the time of the accident under the act approved June 10, 1911, in force May 1, 1912, known as the Workmen's Compensation Act. If this assumption from an examination of the law and facts proves to be true, the peremptory instruction should have been given as the facts so far as material are not in dispute.

The only notice that is claimed by appellee to have been given by appellant that it would not provide compensation and come under said act is of date December 22, 1911, and filed with the Secretary of the Bureau of Labor Statistics of the St-ate of Illinois, December 23, 1911.

It is first argued by appellant that this notice of rejecting the provisions of this act was for the remainder of the year 1912 only and unless a further notice was given 60 days previous to the first day of January, 1913, appellant automatically on January 1, 1913, went under its provisions by operation of law.

It is further argued that the copy of the notice introduced

Fourth: That court erred in instructing and returning to instruct jury, and in admit proper evidence offered by appellant.

Under the first error argued a construction of the compensation act of 1911 with appellee's exhibit 6 a notice to Bureau of Labor Statistics of date December 22, 1911, and received and filed December 23, 1911, is involved.

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The only notice that is claimed by appellee to have been given by appellant that it would not provide compensation and came under said act is of date December 22, 1911, and filed with the Secretary of the Bureau of Labor Statistics of the State of Illinois, December 23, 1911.

It is first argued by appellant that this notice of rejecting the provisions of this act was for the remainder of the year 1912 only and unless a further notice was given 60 days previous to the first day of January, 1913, appellant automatically on January 1, 1913, went under its provisions by operation of law.

It is further argued that the copy of the notice introduced

in evidence was incompetent. If appellant went under provisions of the act automatically or if there was no competent evidence of showing appellant had rejected the act peremptory instruction should have been given and would bring to an end further discussion of the errors assigned.

The question of whether or not appellant was after January 1, 1913, and on the day of the accident under the provisions of the Compensation Act of 1911 is a matter of construction to be put upon the act. The statute reads, as follows:

Sec. 1. Every employer covered by the provisions of this act may elect to provide and pay compensation for injuries, etc., and thereby relieve himself from any recovery of damages except as herein provided. If, however, any such employer shall elect not to provide and pay compensation, etc., he shall not escape liability because, etc.

"A" Every employer is presumed to have elected to provide and pay compensation according to the provisions of this act, unless and until notice in writing of his election to the contrary is filed with the State Bureau of Labor Statistics.

"B" Every employer within the provisions of this act failing to file such notice shall be bound hereby as to all his employees who shall elect to come within the provisions of this act until January 1st of the next succeeding year and for terms of each year thereafter.

It has become a part of this law by decision of the Supreme Court that at the outset and until notice was filed to the contrary employer and employees within the act by silence accept it and automatically by operation of law came under its provisions and are bound by it until such times and in such manner as the law provides they could give notice to the contrary. This does

in evidence was incompetent. If appellant went under provisions of the act automatically or if there was no competent evidence of showing appellant had rejected the act personally instruction should have been given and would bring to an end further discussion of the errors assigned.

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"2" Every employer is presumed to have elected to provide and pay compensation according to the provisions of this act, unless and until notice in writing of his election to the contrary is filed with the State Bureau of Labor Statistics.

"3" Every employer within the provisions of this act failing to file such notice shall be bound thereby as to all his employees who shall elect to come within the provisions of this act until January 1st of the next succeeding year and for terms of each year thereafter.

It has become a part of this law by decision of the Supreme Court that at the outset and until notice was filed to the contrary employer and employees within the act by silence accept it and automatically by operation of law come under its provisions and are bound by it until such time and in such manner as the law provides they could give notice to the contrary. This does

not mean that it is necessary to accept it at the beginning of each year, but once accepted, that acceptance is good until the proper notice is given not to be bound by it.

Having elected to come under the provisions as long as such election remains in force the act is effective as to parties making election and in case both employer and employee elect to come under its provision the act itself becomes a part of the contract of employment." (Deibeikis vs. Link Belt Co., 261 Ill., 454.)

The statute does not provide express terms how or when by an election made by employer rejecting the act he may again come under it. To hold that the notice he gives is good as a rejection for only a limited time is not authorized by the statute and to so hold would be by reading into the statute something that does not appear, viz.: "This notice of rejection is to be binding until another or further notice is given January 1st following."

This construction unless made necessary by the statute would not be in accord with the acts that bind a party making a statement or giving a notice. Where a notice or statement affects the contractural relations of parties made by one of the parties ~~xxxx~~ ~~by~~ he is held by such statement until it is withdrawn or otherwise disposed of. In this case the notice given stood as a negative election to be acted upon by all interested parties until withdrawn. The fact that the same statute of 1913 makes this provision does not give to the statute of 1911 a different meaning, but it would appear that the legislature were intending to give it a construction that could not be misunderstood.

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There is no provision in the act which confers upon the employee the right to elect to be governed by the act in his relations to an employer who had rejected it. (Dietz vs. Big Muddy Coal Co., 263 Ill., 480.) The notice that employer had rejected the provisions on file at the place provided by law good until withdrawn as fixing the status of the parties is the most reasonable and logical construction, and the court did not commit error in holding that appellant was not operating its coal mine in question at the time of the accident under the provisions of the compensation act of 1911.

It being the intention of the legislature that there could be but two elections one to come under the act and the other to reject it, the first exercised by silence and the other by a negative election. The second or negative election can only be made in the manner and at the time provided by the act for the protection of the rights of those under the act, but when such negative election is exercised it is for such a period of time as the party so electing may desire and until such an inducement to employers to operate under the act, those within its provisions who rejected it forfeited the right to the defenses enumerated therein and these defenses are lost without regard to the status of the employee. (Dietz vs. Big Muddy Coal Co., 263 Ill., 480.)

The provisions of the act with reference to the 60 days' notice is for the benefit of those having rights which have accrued to them under the act or which might accrue before under the law they could change their status under the act. The rights of all interested parties where the employer is operating under a notice rejecting the act are at all times fixed by the act and under the law and it is immaterial in point of time

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It being the intention of the legislature that there could be but two elections one to come under the act and the other to reject it, the first exercised by silence and the other by a negative election. The second or negative election can only be made in the manner and at the time provided by the act for the protection of the rights of those under the act, but when such negative election is exercised it is for such a period of time as the party so electing may desire and until such an indicement to employers to operate under the act, those within its provisions who rejected it forfeited the right to the defenses enumerated therein and these defenses are lost without regard to the status of the employee. (Dietz vs. Big Muddy Coal Co., 285 Ill., 480.)

The provisions of the act with reference to the 60 days' notice is for the benefit of those having rights which were secured to them under the act or which might accrue before under the law they could change their status under the act. The rights of all interested parties where the employer is operating under a notice rejecting the act are at all times fixed by the act and under the law and it is immaterial in point of time

when it withdraws its negative election.

Upon the question of directing a verdict as well as admitting improper evidence the admissibility of the certified copy of notice filed with Bureau of Labor Statistics, December 22, 1911, offered in evidence by appellee and admitted by the Court is to be disposed of: "Under Sec. 2 of the Act paragraph "A," Every such employer is presumed to have elected to provide and pay compensation according to the provisions of this act, unless and until notice in writing of his election to the contrary is filed with State Bureau of Labor Statistics."

Therefore appellee to have a right to maintain this suit must prove that appellant had rejected the act and to do this must first show appellant had filed such a notice with the Bureau named in the act. The original notice without proof of the filing in accordance with the act would not be sufficient. The objection to the notice that the notice applied to 1912 and not to 1913 we dispose of with the reasons given for holding that at the time of the accident appellant was operating under the negative election made and not withdrawn.

The objection that the copy is not the best evidence is without merit because we may assume that the legislature by providing that the original was to be filed in one of the departments of State created by it intended to make it a public document subject to the protection and respect such documents are to receive. That would preclude any treatment that it is a document of interest only to employer and employee and ready to be produced by either in court at will or upon notice. The rule is if this became a public document by law whether judicial or non-judicial, one which the public has the right to inspect, and one which could not, without inconvenience to the

when it withdraws its negative election.

Upon the question of directing a verdict as well as admitting improper evidence the admissibility of the certified copy of notice filed with Bureau of Labor Statistics, December 30, 1911, offered in evidence by appellee and admitted by the Court is to be disposed of: "Under Sec. 2 of the act paragraph "A," Every such employer is presumed to have elected to provide and pay compensation according to the provisions of this act, unless and until notice in writing of his election to the contrary is filed with State Bureau of Labor Statistics."

Therefore appellee to have a right to maintain this suit must prove that appellant had rejected the act and to do this must first show appellant had filed such a notice with the Bureau named in the act. The original notice without proof of the filing in accordance with the act would not be sufficient. The objection to the notice that the notice applied to 1912 and not to 1911 we dispose of with the reasons given for holding that at the time of the accident appellant was operating under the negative election made and not withdrawn.

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public interests, be removed from their place of custody it may be proved by copies exemplified or otherwise duly authenticated. (Burr Jones Law of Evidence Vol. 2, Section 534.) This being the law this copy was not secondary evidence but the best evidence and needed no foundation to support it. Under the common law without statutory provision was this notice properly authenticated and entitled to admission in evidence.

This act makes the filing of a notice with the Bureau of Labor Statistics prima facie evidence of its execution and by analogy would give like effect to a certified copy thereof. Certified to by the person charged with the custody of the original. The notice in this case and its filing with the proper department of State and the appellant by pleading does not deny the execution of the notice or filing of same thereby waiving proof either of execution or filing of same. The notice and the certificate offered in evidence were the best evidence and admissible under the pleadings.

For the reasons given we regard exhibits E and G competent; Exhibit F immaterial but its admission harmless error. These being the letters referred to under appellant's second reason in argument of errors.

Appellant insists that although appellant had rejected the compensation act it was not deprived of its common law defenses because appellee had not elected to come under the act. Since this appeal this question has been disposed of by our Supreme Court in case of Dietz Vs. Big Muddy Coal Co., 263 Ill., 480.

The phrase: "Any employee who has elected to accept the provisions of this act," to be understood would read any em-

public interests, be removed from their place of custody it may be proved by copies examplified or otherwise duly authenticated. (Burr Jones Law of Evidence Vol. 2, Section 384.) This being the law this copy was not secondary evidence but the best evidence and needed no foundation to support it. Under the common law without statutory provisions was this notice properly authenticated and entitled to admission in evidence.

This act makes the filing of a notice with the Bureau of Labor Statistics prima facie evidence of its execution and by analogy would give like effect to a certified copy thereof. Certified to by the person charged with the custody of the original. The notice in this case and its filing with the proper department of State and the appellant by pleading does not deny the execution of the notice or filing of same thereby waiving proof either of execution or filing of same. The notice and the certificate offered in evidence were the best evidence and admissible under the pleadings.

For the reasons given we regard exhibits 2 and 3 competent; Exhibit 1 immaterial but its admission harmless error. These being the letters referred to under appellant's second reason in argument of errors.

Appellant insists that although appellant had rejected the compensation act it was not deprived of its common law defense because appellee had not elected to come under the act. Since this appeal this question has been disposed of by our Supreme Court in case of Diets Vs. Big Muddy Coal Co., 265 Ill., 440.

The phrase: "Any employee who has elected to accept the provisions of this act," to be understood would read any em-

(9)

ployee who has not elected to not accept the provisions of this act. It is not contended by appellant that appellee ever elected to reject the act and under the case of Dietz vs. Big Muddy Coal Co., Supra, it is immaterial as these defenses are lost to all those employers coming under its provisions who rejected the same without regard to status of the employee. With these common law defenses lost to appellant and from an examination of the record the contention of appellant in instructing jury is without merit.

The contention of appellant as to refusal of court to admit proper evidence there is pointed out the refusal to permit a cross examination of appellee's witnesses as to conditions in room 60 of 2nd southeast entry which was improper.

While numerous questions are propounded in appellant's brief even to the constitutionality of the compensation act which is not a subject to be considered when appeal is taken to this court. We have examined and passed upon all the errors argued and finding no reversible error, the judgment will be affirmed.

Affirmed.

##########

(Not to be reported in full.)

ployee who has not elected to not accept the provisions of this act. It is not contended by appellant that appellee ever elected to reject the act and under the case of Dietz vs. Big Muddy Coal Co., Supra, it is immaterial as these defenses are lost to all those employers coming under its provisions who rejected the same without regard to status of the employee. With these common law defenses lost to appellant and from an examination of the record the contention of appellant in instructing jury is without merit.

The contention of appellant as to refusal of court to admit proper evidence there is pointed out the refusal to permit a close examination of appellee's witnesses as to conversations in room 60 of 2nd southeast entry which was improper.

While numerous questions are propounded in appellant's brief even in the constitutionality of the compensation act which is not a subject to be considered when appeal is taken to this court. We have examined and passed upon all the errors argued and finding no reversible error, the judgment will be affirmed.

AFFIRMED.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

NOIN

Opinion Filed Oct 28, 1914.

A 6041

Opinion of the Appellate Court

63

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and fourteen, the same being the 24th day of March, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff*

And afterwards in Vacation, after said March term, to-wit: On the 28th day of July, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

190 I.A. 604

Denning Adm.

vs.

No. 66.

October Term, 1913.

The Prudential Ins. Co.

~~ERROR TO~~
APPEAL FROM

City COURT

Harrin ~~COUNTY~~

TRIAL JUDGE

Hon. N. W. Clements.

Term No. 66. Agenda No. 43.

October Term A.D.1913.

Alfred N.Deming, Administrator of Estate of Claud Deming, deceased, Appellee, vs. The Prudential Insurance Company, of America. Appellant.	Appeal from City Court of Herrin.

Opinion by Harris, J.

This is a suit in assumsit brought by appellee as administrator of Estate of Claud Deming, deceased, to recover the amount of two life insurance policies, issued by appellant on the life of appellee's intestate, who died January 19th, 1910. One of the policies was for $100 and was dated May 10,1909, and the other dated December 20,1909, for the sum of $500.00.

The declaration contained two counts each declaring upon one of the policies in the usual form and setting out the policies in full. To this declaration appellant filed five special pleas. The first averred by the policy the liability of appellant should be limited to a return of the premiums paid, if the insured was not in sound health at the time, therefore the liability was limited to amount of premiums paid. Pleas two, three and four set forth certain questions and answers thereto, contained in the application for insurance, in reference to the health of the insured at that time and prior thereto, and the fifth plea a question and answer as to whether either parent or any brother or sister had died of consumption, and averred that the answers to these questions by the insured were false. The replication

Term No. 66. Appeals No. 67.

October Term A.D.1912.

Alfred H.Dowling, Administrator of Estate of Ozand Dowling, deceased, Appellee.	
vs.	Appeal from City Court of Norwich.
The Providential Insurance Company, of Hartford. Appellant.	

Opinion by Harris, J.

This is a suit in assumpsit brought by appellee as administrator of Estate of Ozand Dowling, deceased, to recover the amount of two life insurance policies, issued by appellant on the life of appellee's intestate, who died January 19th, 1910. One of the policies was for $100 and was dated May 10,1909, and the other dated December 20,1909, for the sum of $800.00.

The declaration contained two counts each declaring upon one of the policies in the usual form and setting out the policies in full. To this declaration appellant filed five special pleas. The first averred by the policy the liability of appellant should be limited to a return of the premiums paid, if the insured was not in sound health at the time, therefore the liability was limited to amount of premiums paid. Pleas two, three and four set forth certain questions and answers thereto, contained in the application for insurance, in reference to the health of the insured at that time and prior thereto, and the fifth plea a question and answer as to whether either parent or any brother or sister had died of consumption, and averred that the answers to these questions by the insured were false. The replication

to the first of said pleas stated that appellant's agent was informed by the insured, when he took the application, that he was not in sound health and issuing the policy, with such knowledge, appellant waived such provision of the policy. Replications to pleas two, three, four and five stated that the answers relied upon in said pleas as a defense were written by appellant's agent without the knowledge and consent of the insured. Upon the trial special interrogatories were submitted to the jury and verdict finding the issues for appellee on the two policies for the sum of $507.10, followed by judgment on the verdict and this appeal.

Appellant from its assignment of errors argues for reversal errors, as follows:

First: Error in refusing to instruct jury at the close of all the evidence for appellant.

Second: Verdict is against weight of evidence.

Third: Error in refusing proper instructions offered by appellant.

Fourth: The giving of erroneous instructions for appellee.

Fifth: Error in refusing to admit proper evidence offered by appellant.

Sixth: Improper remarks of Counsel for appellee in presence of jury.

The issues under the two policies and the pleadings were: Did the insured at the time appellant's agent took the application inform said agent that he was not of sound health? Did the insured sign the application for the second policy? Did either parent, brother or sister die of consumption? What was the condition of health of insured at the time of signing application.

The first error argued upon the refusal of court to instruct jury is based upon a provision in the policies that if the insured

to the first of said pleas stated that appellant's agent was informed by the insured, when he took the application, that he was not in sound health and leaving the policy, with such knowledge, appellant waived such provision of the policy. Replications to pleas two, three, four and five stated that the answers relied upon in said pleas as a defense were written by appellant's agent without the knowledge and consent of the insured. Upon the trial special interrogatories were submitted to the jury and verdict finding the issues for appellee on the two policies for the sum of $808.10, followed by judgment on the verdict and this appeal.

Appellant from the assignment of errors argues for reversal errors, as follows:

First: Error in refusing to instruct jury at the close of all the evidence for appellant.

Second: Verdict is against weight of evidence.

Third: Error in refusing proper instructions offered by appellant.

Fourth: The giving of erroneous instructions for appellee.

Fifth: Error in refusing to admit proper evidence offered by appellant.

Sixth: Improper remarks of Counsel for appellee in presence of jury.

The issues under the two policies and the pleadings were: Did the insured at the time appellant's agent took the application inform said agent that he was not of sound health? Did the insured sign the application for the second policy? Did either parent, brother or sister die of consumption. Had he the condition of health of insured at the time of signing application.

The first error argued upon the refusal of court to instruct jury is based upon a provision in the policies that if the insured

was not in sound health at the time the policy was issued then the liability of the appellant was limited to a return of the premiums. From this the argument proceeds that unless the knowledge acquired was as to the nature and kind of trouble at the time such knowledge would not include consumption and the company would not be bound by the fact alone that insured said he was not in good health, and because the evidence failed to show that insured was afflicted with consumption the court should have given instruction. This proposition has been decided adversely to appellant in this case, reported in the 169 App.,96. If the agent of appellant was notified when he took the application that the insured was not in sound health, it is immaterial what caused such a condition of health. There was evidence tending to show that the agent of appellant was notified that the insured at the time was not in sound health, and this was sufficient to make it a question of fact for the jury to determine, and the court did not commit error in refusing to direct a verdict. It is contended that the verdict is manifestly against the weight of the evidence. The rule, that unless it is apparent that there is no evidence, if standing alone, to support a verdict, or the verdict is contrary to the evidence, the Court will refuse to set it aside upon this ground alone must be followed. The above statement as a rule must be a logical conclusion deduced from a reading of the facts in the numbrous authorities cited by appellant as to the power and the duty of both trial and appellate courts over verdicts. It is when the evidence considered most favorably in supporting the verdict is so unsatisfactory, from its kind or character or where something has been said or done during the trial that impresses the court that the verdict is without evidence to support it or is the result of passion or pre-

was not in sound health at the time the policy was issued then the liability of the appellant was limited to a return of the premiums. From this the argument proceeds that unless the knowledge required was as to the nature and kind of trouble at the time such knowledge would not include consumption and the company would not be bound by the fact alone that insured said he was not in good health, and because the evidence failed to show that insured was afflicted with consumption the court should have given instruction. This proposition has been decided adversely to appellant in this case, reported in the 169 App.,96. If the agent of appellant was notified when he took the application that the insured was not in sound health, it is immaterial what caused such a condition of health. There was evidence tending to show that the agent of appellant was notified that the insured at the time was not in sound health, and this was sufficient to make it a question of fact for the jury to determine, and the court did not commit error in refusing to direct a verdict. It is contended that the verdict is manifestly against the weight of the evidence. The rule, that unless it is apparent that there is no evidence, it standing alone, to support a verdict, or the verdict is contrary to the evidence, the court will refuse to set it aside upon this ground alone must be followed. The above statement as a rule must be a logical conclusion deduced from a reading of the facts in the numerous authorities cited by appellant as to the power and the duty of both trial and appellate courts over verdicts. It is when the evidence considered favorably in supporting the verdict is so unsatisfactory, from its kind or character or where something has been said or done during the trial that impresses the court that the verdict is without evidence to support it or is the result of mention or pre-

judice that a verdict should be set aside. The question of the number of witnesses, weight of the evidence, and the credibility of the witnesses as argued in this case, is not a sufficient ground to justify this Court in saying that the jury were wrong, and the Court right in determining a question of fact.

It is also urged by appellant that the Court committed error in refusing appellant's instructions numbers 2,3,4,5,7, and 8. The Court gave as a series thirteen instructions for appellee and fifteen for appellant, a total of twenty-eight instructions. While the number of instructions alone should not determine whether the jury were properly instructed, we have a right to assume in any ordinary case, instructions prepared and presented, as under our practice from the number given, a jury ought to be reasonably well informed as to the law applicable to the issues in the case.

The rule of law that a party cannot ask by different instructions presented in different language for an instruction upon a principle and complain because the court gave one and not the other is well established. A party is not entitled to a repetition of the law, and has no right to complain if the court selects from his instructions those Counsel regard as the least important so long as the law involved is given to the jury as asked for by the party. This applies to all of the foregoing refused instructions except number five, and the special interrogatories submitted by appellant and answered by the jury that the insured was not in sound health at the time either policy was issued is conclusive of the fact, that the refusal of number five did appellant no harm. The law applicable to the issues involved set out in these instructions was given by the court to the jury at the request of the appellant.

By appellant's given instruction No. 6 the jury were informed that they might consider the interest of any witness interested in the outcome of their verdict in judging

judge that a verdict should be set aside. The question of the number of witnesses, weight of the evidence, and the credibility of the witnesses as argued in this case, is not a sufficient ground to justify this court in saying that the jury were wrong and the Court right in determining a question of fact.

It is also urged by appellant that the Court committed error in refusing appellant's instructions numbers 4, 5, 6, 7, and 8. The Court gave as a series thirteen instructions for appellee and fifteen for appellant; a total of twenty-eight instructions. While the number of instructions alone should not determine whether the jury were properly instructed, we have a right to assume in any ordinary case, instructions presented and presented, as under our practice from the number given, a jury ought to be reasonably well informed as to the law applicable to the issues in the case.

The rule of law that a party cannot ask by different instructions presented in different language for a instruction upon a principle and complain because the court gave one and not the other is well established. A party is not entitled to a repetition of the law, and has no right to complain if the court selects from his instructions those counsel regard as the least favorable as long as the law involved is given to the jury as asked for by the party. This applies to all of the foregoing refused instructions except number 7, and the special interrogatories submitted by appellant and answered by the jury that the insured was not in sound health at the time either policy was issued is somewhat of the fact, that the refusal of number five did appellant no harm. The law applicable to the issues involved set out in these instructions was given by the court to the jury at the request of the appellant.

-4-

The complaint of appellant as to the giving of appellee's first, third, eighth and ninth instructions cannot be sustained, as this case tried upon the same issues with practically the same instructions was before this court before and the instructions as given criticised and passed upon. Appellant met the instructions here criticised with instructions as to the defense and no error was thereby committed. The error complained of in refusing to admit evidence offered upon behalf of appellant is the same complaint urged as to this offered evidence in this court upon the former appeal, 169 App.,96. We held the evidence improper and find no reason to change our holding in that regard.

The error last argued by appellant that Counsel for appellee made improper remarks in the trial of the case. The holdings of the courts in the cases cited are to be commended and in every case where counsel have by word or conduct tried to improperly influence a verdict or decision they are to be held to strict account therefor, even to the extent of having his client suffer for his misconduct. However, from an examination of this record there has not been anything said by Counsel that comes within the class of cases cited. We fail to find anything appealing to sympathy or prejudice or even disrespectful, except that it might be said they had spoken, when not spoken to, and replied when no reply was necessary, a fault not to be commended, but a fault of frequent occurrence in the trial of cases.

This case, with two trials in the city court, twice considered by this court, a verdict sustained by the evidence should not be reversed for errors except those that go to the merits of the controversy, and finding no such errors the judgment will be affirmed.

Affirmed.

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(Not to be reported in full)

The complaint of appellant as to the giving of appellee's first, third, eighth and ninth instructions cannot be sustained, as this case tried upon the same issues with practically the same instructions was before this court before and the instructions as given criticised and passed upon. Appellant had the instructions here criticised with instructions as to the defense and no error was thereby committed. The error complained of in refusing to admit evidence offered upon behalf of appellant is the same complaint urged as to this offered evidence in this court upon the former appeal, 168 App.,98. We held the evidence improper and find no reason to change our holding in that regard.

The error last argued by appellant that counsel for appellee made improper remarks in the trial of the case. The judges of the courts in the cases cited are to be commended and in every case where counsel have by word or conduct tried to improperly influence a verdict or decision they are to be held to strict account therefor, even to the extent of having its client suffer for its misconduct. However, from an examination of this record there has not been anything said by counsel that comes within the class of cases cited. We fail to find anything appealing to sympathy or prejudice or even disrespectful, except that it might be said they had spoken, when not spoken to, and appeared when no reply was necessary, a fault not to be commended, but a fault of frequent occurrence in the trial of cases.

This case, with two trials in the city court, twice considered by this court, a verdict sustained by the evidence should not be reversed for errors except those that go to the merits of the controversy, and finding no such errors the judgment will be affirmed.

Affirmed.

****

Not to be reported in full.

NOIN

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 28th *day of July, A. D. 1914.*

A. C. Millspaugh

Clerk of the Appellate Court.

164

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of ~~March~~ October in the year of our Lord, one thousand nine hundred and fourteen, the same being the 29th day of ~~March~~ October, in the year of our Lord, one thousand nine hundred and fourteen.

Present:

Hon. Harry Higbee, ~~Presiding~~ Justice.
Hon. James C. McBride, Presiding Justice.
Hon. Thos. M. Harris, Justice.

A. C. MILLSPAUGH, Clerk. *W. S. PAYNE, Sheriff*

And afterwards ~~in Vacation, after said March term~~, to-wit: On the 9th day of ~~July~~ November, A. D. 1914, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

190 I.A. 607

Nicholson et al

vs.

No. 17

March Term, 1914.

Nicholson Coal Co et al

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Washington COUNTY

TRIAL JUDGE

Hon. Louis Bonnewitz

Term No. 17. Agenda No. 49.

March Term, A. D. 1914.

James L. Nicholson, et al. Appellant, vs. Nicholson Coal Company, et al., Appellees.	Appeal from Washington.

Opinion by Higbee, P.J.

This is an appeal from a decree in chancery in a suit based upon the following facts and circumstances: On October 15, 1912, and for some time prior thereto, The Nicholson Coal Company of which John B. Brasher was president, owned and operated a coal mine near Nashville, Illinois, and held by deed or lease the coal rights connected with some five hundred acres of land and two town lots and also owned a large amount of mining machinery, buildings and articles of personal property, used in carrying on the business of mining. At the time mentioned there were three mortgages on all of said property, one to Charles E. Dallam for $22,000.00, another to Elizabeth A. Brown for $11,700.00 and the third to William Simmons for $1,400.00. Brasher was anxious to sell the mine and in that connection called on Messrs. Johnson and Owen, attorneys, of St. Louis, Missouri, who interested M. B. Stephens, a client of theirs in the matter. Brasher and Stephens were brought together and the matter of the sale discussed by them. Afterwards on said October 15, 1912, the two met in the office of Johnson and Owen, when Stephens said he was not ready to consider the purchase of the mine but Brasher, who had a payroll for his mine

Term No. 17. Agenda No. 18.

Terre Haute, Ind. 3. 1914.

James L. Nicholson,
Appellant,
vs.
Nicholson Coal Company, et al.,
Appellees.

Appeal from Washington.

Opinion by Higbee, J.J.

This is an appeal from a decree in chancery in a suit based upon the following facts and circumstances: On October 15, 1912, and for some time prior thereto, The Nicholson Coal Company of which John B. Brasher was president, owned and operated a coal mine near Sandville, Illinois, and held by lease or lease the coal rights connected with some five hundred acres of land and the town lots and also owned a large amount of mining machinery, buildings and articles of personal property, used in carrying on the business of mining. At the time mentioned there were three mortgages on all of said property, one to Charles E. Pelham for $22,000.00, another to Elizabeth A.Brown for $11,700.00 and the third to William Simmons for $1,400.00. Brasher was anxious to sell the mine and in that connection called on Kasera, Johnson and Owen, attorneys, of St.Louis, Missouri, who interested E. E. Stephens, a client of theirs in the matter. Brasher and Stephens were through negotiations and the matter of the sale discussed by them. Afterwards on about October 15, 1912, the two met in the office of Johnson and Owen, when Stephens said he was not ready to consider the purchase of the mine but Brasher, who had a payroll for his mine

which he was unable to meet, appealed to Stephens to loan him money to make these payments and after some conversation, Stephens loaned him $2,400.00 for that purpose and received a note for that amount from the company, executed by Brasher as president. At the same time a warranty deed for all of the above property was executed by the Company by Brasher, its president, conveying the same to Stephens, said premises being declared in said deed to be free from all incumbrances, except the first two above mentioned. In connection with the same transaction and at the same time, the following memorandum was drawn up and signed by Stephens:

"This memorandum witnesseth: that there is now pending between the Nicholson Coal Company and N. M. Stephens, acting as Trustee, for himself and others, a proposition for the sale, by the Coal Company, of its mining property and equipment at Nashville, Ill., and that whereas it has been deemed advisable to have an expert examine the Coal Mine and the coal mining property and equipment before completing the transaction and it is necessary to provide the funds this day to said Nicholson Coal Company with which to make the payroll this day maturing, amounting in the aggregate to Twenty Four Hundred (2,400) Dollars, and whereas the said N. M. Stephens and associates have advanced said money and have taken a note of the said Nicholson Coal Company therefor, bearing even date herewith:

Now, therefore, it is understood by and between the respective parties that in case the report of the expert is favorable, that the sale of the said property to the said N. M. Stephens as trustee shall be absolute and all further and necessary deeds, conveyances, instruments or contracts to that effect will be executed by the Nicholson Coal Company, and that the estate in

but which he was unable to meet, appealed to Stephens to loan his money to make these payments and after some conversation, Stephens issued his $4,400.00 for that purpose and received a note for that amount from the company, executed by Brenner as president. At the same time a warranty deed for all of the above property was executed by the Company by Brenner, its president, conveying the same to Stephens, said premises being declared in said deed to be free from all incumbrances, except the first two above mentioned. In connection with the same transaction and at the same time, the following memorandum was drawn up and signed by Stephens:

"This memorandum witnesseth: that there is now pending between the Nicholson Coal Company and R. K. Stephens, acting as Trustee, for himself and others, a proposition for the sale, by the Coal Company, of the mining property and equipment of Beardsville, Ill., and that whereas it has been deemed advisable to have an expert examine the Coal Mine and the coal mining property and equipment before completing the transaction and it is necessary to provide the funds this day to said Nicholson Coal Company with which to make the payroll this day ensuing, amounting in the aggregate to Twenty Four Hundred ($2,400) Dollars, and whereas the said R. K. Stephens and associates have advanced said money and have taken a note of the said Nicholson Coal Company therefor, bearing even date herewith:

Now, therefore, it is understood by and between the respective parties that in case the report of the expert is favorable, that the sale of the said property to the said R. K. Stephens as trustee shall be absolute and all further and necessary deeds, conveyances, instruments or contracts to that effect will be executed by the Nicholson Coal Company, and that the entire in

fee simple and in perpetuity will be vested in the said N. M. Stephens upon the terms hereinafter stated, and that on the other hand in case the report of the expert is unfavorable as to the said coal mine and coal mining properties, and the said M. M Stephens shall so elect, that then, and in this event, the advance of the above named sum shall be considered merely a loan, payable according to the terms of said note, and upon the repayment of the same by the Nicholson Coal Company at maturity, said M. M. Stephens will relieve all claims to said property and the same shall reinvest in said Coal Company. It is further understood that if said report of the expert on said coal mine and coal mining properties is favorable, and the sale is consummated that then, and in that event, the said M.M.Stephens, Trustee, is to take the same subject to all existing liens and subject to the payment of the outstanding debts of the said Nicholson Coal Company (inclusive of the advance hereinabove referred to together with the payroll maturing October 31st, 1912) all amounting in the aggregate to not to exceed the sum of Fifty Thousand ($50,000) Dollars and in addition thereto the grantor or its nominees shall receive Twenty Thousand($20,000) Dollars worth of stock in the Corporation proposed to be organized to take over said property.

Dated St.Louis,Missouri,this 15th day of October,A.D.1912.

M.M.Stephens."

On October 24, 1912, in pursuance of said memorandum two reports were made on the mine property to appellee,by men selected for that purpose. One, by Henry Hummert, stated that the mine was in a fair condition so far as he had gone through it but that he had not inspected all the workings; that by the addition of one more boiler and one more pit car the output could be

fee simple and in perpetuity will be vested in the said K. K. Stephens upon the terms hereinafter stated, and that on the error found in case the report of the expert is unfavorable as to the said coal mine and coal mining properties, and the said K. K Stephens shall so elect, that then, and in this event, the advance of the above named sum shall be considered merely a loan, payable according to the terms of said note, and upon the repayment of the same, the Hickman Coal Company is entitled, said K. K. Stephens will reliave all claim to said property and the same shall reinvest in said Coal Company. It is further understood that if said report of the expert on said coal mine and coal mining properties is favorable, and the sale is consummated that then, and in that event, the said K.K.Stephens, Trustee, is to take the same subject to all existing liens and subject to the payment of the outstanding debts of the said Hickman Coal Company (including of the advance hereinabove referred to together with the payroll maturing October 31st, 1913) all amounting in the aggregate to not to exceed the sum of Fifty Thousand ($50,000) Dollars and in addition thereto the greater or lie consideration shall receive Twenty Thousand($20,000) Dollars worth of stock in the Corporation proposed to be organized to take over said property.

Dated at Louisville, Kentucky, this 15th day of October, A.D. 1913.

K.K.Stephens."

On October 24, 1913, in pursuance of said memorandum two reports were made on the mine property to applicle, by men selected for that purpose. One, by Jenny Bennett, stated that the mine was in a fair condition so far as he had gone through. It but that he had not inspected all the workings; that by the addition of one more boiler and one more pit car the output could be

increased to five or six hundred tons in a short time; that the mine was located nicely for home trade; that coal business in general had been very unsatisfactory and a person should thoroughly consider the matter before going into it at that time. On the same day Hummert appears to have made a second report in which he says the output of the mine seems to be limited to about three or four hundred tons a day on account of certain bad conditions existing; that in order to make it pay a profit, the tonnage would have to be increased to 700 tons a day and that it would require some time and expense to do this. He also submitted his estimate of the value of the property which was placed at $41,300.00 not including the land and coal rights. The other party who examined the mine, L.C.Barnard, stated that it did not impress him favorably for several reasons which he named; that he estimated it would require an expenditure of at least ten thousand dollars to put it in position to operate at a profit and that he did not consider the property in the shape it then was, to be worth more than $25,000. On October 25, 1912, appellee put his deed on record and a few days later, October 29, he again advanced $2,400 to meet the fortnightly payroll and took a note of the company therefor. On November 15, following, Stephens and said Elizabeth A. Brown signed a note for the like amount of $2,400 for another payroll and she took charge of the mine to collect the amounts so advanced, but it does not appear she held it for a very long time. On November 16, 1912, Stephens made the following memorandum for the Coal Company: "Whereas, The Nicholson Coal Company have executed to me a deed to their property, at Nashville, Ill., and I have paid out for said company about

increased to five or six hundred tons in a short time; that the mine was located nicely for some study; that coal business in general had been very unsatisfactory and a person should thoroughly consider the matter before going into it at that time. On the same day Dunwell appears to have made a second report in which he says the output of the mine seems to be limited to about three or four hundred tons a day on account of certain bad conditions existing; that in order to make it pay a profit, the tonnage would have to be increased to 700 tons a day and that it would require some time and expense to do this. He also submitted his estimate of the value of the property which was placed at $21,000.00 not including the land and coal rights. The other party who examined the mine, J.T.Barrett, stated that it did not impress him favorably for several reasons one which he named; that he estimated it would require an expenditure of at least ten thousand dollars to put it in condition to operate at a profit and that he did not consider the property in the shape it was then, to be worth more than $25,000. On October 22, 1912, supplies put his bond on record and a few days later, October 29, he again advanced $2,400 to meet the fortnightly payroll and took a note of the company therefor. On November 15, following, Stephens and said Elizabeth A. Brown signed a note for the like amount of $2,400 for another payroll and she took charge of the mine to collect the amounts so advanced, but it does not appear she held it for a very long time. On November 16, 1912, Stephens made the following memorandum for the Coal Company: "Harvey, The Elizabeth Coal Company have executed to me a deed to their property, at Meadville, Ill.; and I have paid out for said company about

seven thousand five hundred dollars and I hereby agree and bind myself to relinquish all claim to said property to said Nicholson Coal Co. or to any one said Company may designate at that time within fifteen days from this date, upon payment to me of said $7,500.00. Given under my hand at East St.Louis, Illinois, this 16th day of November, 1912. It is further agreed that M. M. Stephens shall have control of the property and the receipts of the same from and including this date.

(Signed) M. M. Stephens.

Witness, C. Schulze.

Nicholson Coal Co. by John B. Brasher,President."

Stephens appeared to have had some connection with the operation of the mine at this time but just what it was is not clear and he testified that while Brasher said he would turn the mine over to him, it was in fact never so turned over and he never did have possession of the books or keys.

On Janusry 20, 1913, James L. Nicholson, Clarence Ballam and Elizabeth A. Brown, who are appellants here, and certain others who were joined as complainants, filed a bill in equity to the A pril term, 1913, of the circuit court of Washington County, Illinois, for the benefit of themselves and any other creditors of the Nicholson Coal Company who might intervene. The bill set out the indebtedness referred to in the three mortgages, showing the amount unpaid thereon, stated that appellants owned a part of said indebtedness and that the same was due by the terms thereof and also set forth in full the above memorandum signed by Stephens. It further alleged that a favorable report was made upon said mine and the value of said property and thereupon Stephens accepted and caused to be recorded a deed to him for said property from the Nicholson Coal

seven thousand five hundred dollars and I hereby agree and hind myself to reconvey all claim to said property to said Stephens Coal Co. or to any one said Company may designate at that time within fifteen days from this date, upon payment to me of said $7,500.00. Given under my hand at East St.Louis, Illinois, this 16th day of December, 1915. It is further agreed that R. K. Stephens shall have control of the property and the receipts of the same from and including this date.

(Signed) R. K. Stephens.

Witness, C. Schmidt.

Nicholson Coal Co. by John R. Freeman, President."

Stephens appeared to have had some connection with the operation of the mine at this time but just what it was is not clear and he testified that while Freeman said he would turn the mine over to him, it was in fact never so turned over and he never did have possession of the books or keys.

On January 30, 1919, James T. Nicholson, Florence Nelson and Elizabeth A. Brown, who are appellants here, and certain others who were joined as complainants, filed a bill in equity to the A pril term, 1919, of the circuit court of Washington County, Illinois, for the benefit of themselves and any other creditors of the Nicholson Coal Company who might intervene. The bill set out the indebtedness referred to in the three mortgages, showing the amount unpaid thereon, stated that R. R. Lumbs owned a part of said indebtedness and that the same was due by the terms thereof and also set forth in full the above memorandum signed by Stephens. It further alleged that a favorable report was made upon said mine and the value of said property and thereupon Stephens accepted and caused to be recorded a deed to him for said property from the Nicholson Coal

Company and took possession of the property and that he still holds the same; that complainants are informed that said Stephens denies his liability under said contract of purchase and contends that the deed taken by him was only given to secure a loan and was in fact a mortgage. The bill prayed for foreclosure of the mortgage and that if the debts due each of the complainants should not be paid by a day to be named by the court, that the premises be sold and the proceeds applied, first to the payment of the costs and of said mortgage liens and the surplus to the payment of the debts owing to the other complainants; that if the property failed to bring a sufficient amount to pay complainants in full, judgment be entered in favor of each of the same against said Stephens for any deficiency.

Appellee filed his answer denying the material allegations of the bill and charging fraud and misrepresentation made by Brasher. He also filed his cross bill setting up the execution and delivery of the deed and alleging that the agreement was, that the same was to be treated in the nature of a mortgage to secure the amounts advanced by him and that the total amount so advanced on said security was $13,124.29; that the debts of said company amount to approximately one hundred thousand dollars and that the property was not worth to exceed $40,000, and in the operation of the mine was becoming daily less valuable. It prayed that the said deed might be decreed to be a mortgage and foreclosed and that a receiver might be appointed. A receiver was appointed in vacation, and at the April term, 1913, of said court, by agreement of all parties, a decree was entered, ordering the master in chancery to sell the property and therein all the conflicting rights interests and equities of the parties

company and took possession of the property and that he still holds the same; that complainants are informed that said defendants denies his liability under said contract of purchase and contends that the deed taken by him was only given to secure a loan and was in fact a mortgage. The bill prayed for foreclosure of the mortgage and that if the debts due each of the complainants should not be paid by a day to be named by the court, that the premises be sold and the proceeds applied, first to the payment of the costs and of said mortgage liens and the surplus to the payment of the debts owing to the other complainants; that if the property failed to bring a sufficient amount to pay complainants in full, judgment be entered in favor of each of the same against said Stephens for any deficiency.

Appellee filed his answer denying the material allegations of the bill and charging fraud and misrepresentations made by Brandon. He also filed a cross bill setting up the execution and delivery of the deed and alleging that the representation, that the same was to be treated in the nature of a mortgage to secure the amounts advanced by him and that the total amount so advanced on said security was $12,124.29; that the debts of said company amount to approximately one hundred thousand dollars and that the property was not worth to exceed $40,000, and in the aggregate of the sums was becoming daily less valuable. It prayed that the said deed might be decreed to be a mortgage and foreclosed and that a receiver might be appointed. A receiver was appointed in vacation, and at the April term,1912,of said court, by agreement of all parties, a decree was entered, ordering the master in chancery to sell the property and therein all the conflicting rights interests and equities of the parties

were reserved for further hearing and disposition by the court and the cause was referred to the master in chancery to take proof and report his conclusions and findings and recommend a decree. Afterwards the property was sold by the master in chancery for $4,000.00, the sale approved and deed for the same executed. The amount received was consumed by costs and fees and two judgments against the receiver and nothing was left to apply on the mortgage indebtedness. The master afterwards took the evidence as to the conflicting interests of the parties to the suit and reported the same, together with his conclusions to the court at the October term, 1913.

Objections were filed before the master to his report and overruled and later, having been filed as exceptions, were overruled by the court. The court thereupon entered a decree approving and in accordance with the master's report and finding that by the memorandum entered into by appellant he had the right to elect to purchase said property if the same was acceptable to him or if not acceptable that said deed might be treated as a mortgage for the indebtedness due him from the Coal Company; that in case he elected to purchase the property he was to take the same subject to all existing liens and subject to the payment of the outstanding indebtedness of the company, the same however not to exceed $50,000.00, including the mortgages; but that said Stephens did not assume or agree to pay any part of said outstanding indebtedness, except two payrolls of $5,000.00; that the consideration on the part of Stephens was the amount of the two payrolls he agreed to pay and the delivery of $20,000.00 of the stock of the company on the reorganization; that within one week of said agreement and deed the Nicholson Coal Company and Stephens, by mutual

were reserved for further hearing and disposition by the court and the cause was referred to the master in chancery to take proof and report his conclusions and findings and recommend a decree. Afterwards the property was sold by the master in chancery for $4,000.00, the sale approved and deed for the same executed. The amount received was consumed by costs and fees and two judgments against the receiver and nothing was left to apply on the mortgage indebtedness. The master afterwards took the evidence as to the conflicting interests of the parties to the suit and reported the same, together with his conclusions to the court at the October term, 1913.

Objections were filed before the master to his report and overruled and later, having been filed as exceptions, were overruled by the court. The court thereupon entered a decree approving and in accordance with the master's report and finding that by the memorandum entered into by appellant he had the right to elect to purchase said property if the same was acceptable to him or if not acceptable that said deed might be treated as a mortgage for the indebtedness due him from the Coal Company; that in case he elected to purchase the property he was to take the same subject to all existing liens and subject to the payment of the outstanding indebtedness of the company, the same however not to exceed $80,000.00, including the mortgages; but that said Stephens did not assume or agree to pay any part of said outstanding indebtedness, except two payrolls of $3,000.00; that the consideration on the part of Stephens was the amount of the two payrolls he agreed to pay and the delivery of $20,000.00 of the stock of the company on the reorganization; that within one week of said agreement and deed the Michigan Coal Company and Stephens, by mutual

agreement rescinded and abrogated said conditional sale; that afterwards the property was turned over to said Elizabeth Brown to operate and pay the debts due her and Stephens and she did operate said mine until the appointment of a receiver; that the rights of the creditors were not impaired or increased by the contract as Stephens was to take the property of the company subject to liens of the mortgages and the outstanding debts and that they still have the same rights since the recission that they had under the contract; that the deed to Stephens is a constructive mortgage upon which there is due the sum of $11,372.28 which is a lien on said property subject to the prior mortgages and judgment liens named in the decretal order of the court at its April term, 1913; that judgment should be and is rendered in favor of said Stephens and against said Nicholson Coal Company for said sum of $11,372,28, and that as to $4800 of this amount, represented by the primissory notes of said company, judgment is also rendered against said John B. Brasher. From the decree so entered this appeal is prosecuted, these appellants having no rights in said controversy other than as holders of prior mortgage indebtedness against said mining property. The decrees in the case fully recognized their rights as against the property but denied their right to judgment against Stephens to recover the indebtedness remaining due them after the application of the fund derived from the sale of the property, which fund, as is above stated, was all consumed in the payment of costs and certain judgments against the receivers.

Appellants contend that by said memorandum appellee Stephens became personally liable for the amount due them and

agreement rescinded and abrogated said conditional sale; that afterwards the property was turned over to said Elizabeth Green to operate and pay the debts due her and Stephens and she did operate said mine until the appointment of a receiver; that the rights of the creditors were not impaired or increased by the contract as Stephens was to take the property of the company subject to liens of the mortgagee and the outstanding debts and that they still have the same rights since the rescission that they had under the contract; that the case in Stephens is a constructive mortgage upon which there is due the sum of $11,372.38 which is a lien on said property subject to the prior mortgages and judgment liens named in the decretal order of the court as its April term, 1913; that judgment should be and is rendered in favor of said Stephens and against said Nicholson Coal Company for said sum of $11,372.38, and that as to $4500 of this amount, represented by the promissory notes of said company, judgment is also rendered against said John D. Drasher. From the decree so entered this appeal is prosecuted, these appellants having no rights in said controversy other than as holders of prior mortgage indebtedness against said mining property. The decrees in the case fully recognized their rights as against the property but denied their right to judgment against Stephens to recover the indebtedness remaining due them after the application of the fund derived from the sale of the property, which fund, as is above stated, was all consumed in the payment of costs and certain judgments against the receivers.

Appellants contend that by said mortgage or lien Stephens became personally liable for the amount due them and

that the contract having once been entered into could not be rescinded without their consent; that as the contract had been reduced to writing the master should not have heard evidence tending to vary its terms; and that the court erred in overruling the exceptions to his report and approving the same and entering the decree following its recommendations.

The deed of the property to Stephens is silent as to the assumption of the debts of the Coal Company by Stephens and the proof wholly fails to show any agreement on his part to pay the same, unless the same is contained in the memorandum signed by him above set forth. The language used in that instrument in regard to this question is as follows: "It is further understood that if said report of the expert on said coal mine and coal mining properties is favorable and the sale is consummated that then and in that event the said W. W. Stephens, trustee, is to take the same subject to all existing liens and subject to the payment of the outstanding debts of the said Nicholson Coal Company(inclusive of the advance herein above referred to together with the payroll maturing October 31,1912) all amounting in the aggregate to not to exceed the sum of ~~XXXX~~ $50,000." The difference between acquiring property subject to the lien of debts against the same and of taking it with a promise or undertaking as part of the contract of purchase on the part of the ~~one~~ acquiring property to pay off existing liens against the same, is marked. It will not be presumed that the grantee of real estate subject to mortgage indebtedness has undertaken to pay off such indebtedness and relieve the grantor of his obligation to make such payment unless it is plainly provided in the instrument of conveyance accepted by the grantee that he shall pay such indebtedness or it is other-

that the contract having once been entered into could not be rescinded without their consent; that as the contract had been reduced to writing the master should not have based evidence tending to vary its terms; and that the court erred in overruling the exceptions to his report and approving the same and entering the decree following its recommendation.

The deed of the property to Stephens is silent as to the assumption of the debts of the Coal Company by Stephens and the proof wholly fails to show any agreement on his part to pay the same, unless the same is contained in the memorandum signed by him above set forth. The language used in that instrument in regard to this question is as follows: "It is further understood that if said report of the expert on said coal mine and coal mining properties is favorable and the sale is consummated that then and in that event the said M. M. Stephens, trustee, is to take the same subject to all existing liens and subject to the payment of the outstanding debts of the said Stephens Coal Company(including of the advance herein above referred to together with the payroll matching October 31,1921) all amounting in the aggregate to not to exceed the sum of ~~[illegible]~~ $30,000." The difference between acquiring property subject to the lien of debts against the same and of taking it with a promise or undertaking as part of the contract of purchase on the part of the one acquiring property to pay off existing liens against the same, is marked. It will not be presumed that the grantee of real estate subject to mortgage indebtedness has undertaken to pay off such indebtedness and relieve the grantor of his obligation to make such payment unless it is plainly provided in the instrument of conveyance accepted by the grantee that he shall pay such indebtedness or it is other-

wise so provided by contract to which he is a party.

In Crawford v. Simmons, 180 Ill., 143, it is said, "A deed which is merely made subject to a mortgage specified in it does not render the grantee personally liable for the mortgage debt. To create such a liability there must be something in the nature of a personal, contractual obligation which amounts to an agreement on the part of the grantee to pay off the encumbrance. (Fowler v. Fay 62 Ill. 375; Rapp v. Stoner 104 Id. 618; Comstock v. Hitt 37 Id. 542; 1 Jones on Mortgages sec. 748; Consolidated Coal Co. v. Peers 166 Ill. 361; 15 Am.& Eng.Ency. of Law 832.)"

In Ray v. Lobdell 213 Ill. 389, the doctrine applicable to this proposition is laid down as follows: "The rule to be deduced from the authorities is, if the vendee of land encumbered by mortgage or trust deed, purchases only the vendor's equity of redemption, he is not personally liable to pay the encumbrance resting upon the land, unless he expressly assumed and agreed to pay the same." It is also well settled, that before a third party can acquire a right which he can enforce in a contract between two others, he must be a party to the consideration or the contract must have been entered into for his benefit. Crandell v. Payne, 154 Ill., 627; Godneow v.Jones 75 Id. 48. We are of opinion that the memorandum entered into by Stephens as above set forth, when considered either with or without the deed conveying the property to him, fails to show an intention on his part, in case he should take over the property, to assume the indebtedness against the same. Therefore appellants had no right, under said contract, to a deficiency decree against Stephens to compel him to pay their debts against the Nicholson Coal Company. The proofs also appear to us to show,as

wise so provided by contract to which he is a party.

In Crawford v. Simmons, 180 Ill., 145, it is said, "a deed which is merely made subject to a mortgage specifies it does not render the grantee personally liable for the mortgage debt. To create such a liability there must be something in the nature of a personal, contractual obligation which amounts to an agreement on the part of the grantee to pay off the encumbrance. (Bowler v. Ney 62 Ill. 375; Hoop v. Stoner 104 Id. 616; Comstock v. Hitt 37 Id. 542; Jones on Mortgages sec. 748; Consolidated Coal Co. v. Peers 166 Ill. 301; 15 Am.& Eng.Ency. of Law 832.)"

In Ney v. Ludwig 73 Ill. 349, the doctrine applicable in this proposition is laid down as follows: "The rule to be deduced from the authorities is, if the vendee of land encumbered by mortgage or trust deed, purchases only the vendor's equity of redemption, he is not personally liable to pay the encumbrance resting upon the land, unless he expressly assumed and agreed to pay the same." It is also well settled, that before a third party can acquire a right which he can enforce in a contract between two others, he must be a party to the consideration or the contract must have been entered into for his benefit. Crandall v. Payne, 154 Ill., 624; Godeau v. Jones 75 Id. 18. We are of opinion that the memorandum entered into by Stephens as above set forth, when considered either with or without the deed conveying the property to him, fails to show an intention on his part, in case he should take over the property, to assume the indebtedness against the same. Therefore appellants had no right, under said contract, to a deficiency decree against Stephens to compel him to pay their debts against the Dimmick Coal Company. The proofs appear to be to show,

found by the court below, that after the reports of the experts on the mine were made, Stephens at different times and once by the written notice above set forth, notified Brasher the president of the company, that he held said deed as a constructive mortgage; also that Brasher treated the deed as such and assumed to sell said property to other persons and pay off the lien.

Appellants insist that there was error in admitting the testimony of Stephens, Johnson and Owen as to the terms and conditions of the contract of sale to Stephens and evidence of prior and contemporaneous statements of the parties. It is true that a contract of sale cannot be varied or changed by parole or by statements made by the parties at the time. But this testimony was introduced not to vary or annul any of the terms of the memorandum but to show the surroundings of the parties and the circumstances and conditions existing at the time the memorandum was made, in order that its language might be more clearly understood. So far as the deed is concerned it may be said, as a well founded rule of law, that parole evidence is admissible to show that a deed which is absolute upon its face, was in fact intended to be an equitable mortgage. Scanlan v. Scanlan, 134 Ill.,630; U.M.Life Ins.Co. V. White,106 Id.,67. The value of the property as security for appellants' lien,has been in no wise lessened nor have their rights been in any wise effected by any action of appellee Stephens. The proof wholly failes to show that Stephens in his transactions concerning the property in question, did anything or entered into any contract or memorandum which would obligate him in law or in equity and good conscience to pay the debts due from the Nicholson Coal Company. The evidence does show however that the

found by the court below, that after the reports of the experts on the mine were made, Stephens at different times and once by the written notice above set forth, notified Brasher the president of the company, that he held said deed as a constructive mortgage; also that Brasher treated the deed as such and assumed to sell said property to other persons and pay off the lien.

Appellants insist that there was error in admitting the testimony of Stephens, Thomson and others as to the terms and conditions of the contract of sale to Stephens and evidence of prior and contemporaneous statements of the parties. It is true that a contract of sale cannot be varied or changed by parole or by statements made by the parties at the time, but this testimony was introduced not to vary or annul any of the terms of the memorandum but to show the surroundings of the parties and the circumstances and conditions existing at the time the memorandum was made, in order that its language might be more clearly understood. So far as the deed is concerned it may be said, as a well founded rule of law, that parole evidence is admissible to show that a deed which is absolute upon its face, was in fact intended to be an equitable mortgage. Lenahan v. Lenahan, 124 Ill., 230; C.&E.Life Ins.Co. v. Mills,[illegible] 17. The value of the property as security for appellants' lien, has been in no wise lessened nor have their rights been in any wise affected by any action of appellee Stephens. The proof wholly fails to show that Stephens in his transactions concerning the property in question, did anything or entered into any contract or memorandum which would obligate him in law or in equity and gave assurance to pay the debts the Free Ice Glason Coal Company. The evidence does show however that the

deed to Stephens was in fact a constructive or equitable mortgage and that the amount for which he held it was past due and unpaid and that he had a right to have the same foreclosed. The chancellor in the court below was right in overruling the exceptions to the report of the master, in granting a decree in favor of Stephens on his cross bill to enforce his lien and in refusing to sustain the claim of appellants to a deficiency decree against Stephens for the amounts due them by said company, and said decree is accordingly affirmed.

Decree affirmed.

(Not to be reported in full.)

deed to Stephens was in fact a constructive or equitable mortgage and that the amount for which he held it was past due and unpaid and that he had a right to have the same foreclosed. The chancellor in the court below was right in overruling the exceptions to the report of the master, in granting a decree in favor of Stephens on his cross bill to enforce his lien and in refusing to sustain the claim of appellants to a deficiency decree against Stephens for the amounts due them by said company, and said decree is accordingly affirmed.

Decree affirmed.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th *day of* ~~July~~ November, *A. D. 1914.*

A C Millspaugh

Clerk of the Appellate Court.

NOINI

167

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon on the Fourth Tuesday in the month of ~~March~~ October in the year of our LORD, one thousand nine hundred and ~~thirteen~~ fourteen, the same being the 27th day of ~~March~~ October, in the year of our LORD, one thousand nine hundred and ~~thirteen~~ fourteen

Present:

Hon. JAMES C. McBRIDE, Presiding Justice.
Hon. ~~OWEN P. THOMPSON~~ Thomas M. Harris, Justice.
Hon. HARRY HIGBEE, Justice.

A. C. MILLSPAUGH, Clerk. W. S. PAYNE, Sheriff.

And afterwards, ~~in Vacation, after said March Term~~, to-wit: On the 14th day of ~~October~~ November A. D. 191~~4~~, there was filed in the office of the Clerk of said Court at Mt. Vernon, Illinois, an OPINION in the words and figures following:

190 I.A. 624

John Schiller

vs.

No. 23

March Term, 191~~3~~4.

Oliver H. Madden

~~ERROR TO~~

APPEAL FROM

Circuit COURT

Jasper COUNTY

TRIAL JUDGE

Hon. Thomas M. Jett

Term No. 23. Agenda No. 6.

Appellate Court of the State of Illinois, Fourth District.

March Term, A. D. 1914.

John Schiller, Appellee, vs. Oliver H. Madden, Appellant.	Appeal from the Circuit Court of Jasper County.

Opinion by Harris, J.

The appellee brought this suit against appellant for criminal conversation and filed his declaration in two counts. The first count alleging that appellant contriving and wickedly intending to injure appellee and to deprive him of the society and assistance of Lucinda Schiller, the wife of appellee, on to-wit: June 1, 1913, and on divers other days between that day and the commencement of this suit in said Jasper County wrongfully and wickedly debauched and carnally knew the said Lucinda Schiller, then and there being the wife of appellee and thereby the affection of the said Lucinda Schiller for appellee was then and there alienated and destroyed and also by means of the premises the appellee has from thence hitherto wholly lost and been deprived of the society and assistance of the said Lucinda Schiller, his said wife, in his domestic affairs, which said appellee ought during that time to have had, and otherwise might and would have had. The second count in same form alleges seduction. Damages alleged in sum of Ten Thousand Dollars. The appellant filed the plea of not guilty.

The appellee and Lucinda Schiller were married in the year of 1890 and lived together until a short time prior to the bringing of this suit, July 1, 1913, as husband and wife

Term No. 23. Agenda No. 8.

Appellate Court of the S tate of Illinois,Fourth District.

March Term,A. D. 1914.

John Benjiler, Appellee, vs. Oliver H. Madden, Appellant.	Appeal from the Circuit Court of Jasper County.

Opinion by Harris, J.

The appellee brought this suit against appellant for criminal conversation and filed his declaration in two counts. The first count alleging that appellant contriving and wickedly intending to injure appellee and to deprive him of the society and assistance of Lucinda Benjiler, the wife of appellee, on to-wit: June 1, 1913, and on divers other days between that day and the commencement of this suit in said Jasper County wrongfully and wickedly debauched and carnally knew the said Lucinda Benjiler, then and there being the wife of appellee and thereby the affection of the said Lucinda Benjiler for appellee was then and there alienated and destroyed and also by means of the premises the appellee has from thence hitherto wholly lost and been deprived of the society and assistance of the said Lucinda Benjiler, his said wife, in his domestic affairs, which said appellee ought during that time to have had, and otherwise might and would have had. The second count in same form alleges seduction. Damages alleged in sum of Ten Thousand Dollars. The appellant filed the plea of not guilty.

The appellee and Lucinda Benjiler were married in the year of 1890 and lived together until a short time prior to the bringing of this suit, July 1, 1913, as husband and wife

with a family of children. They were neighbors for about fifteen years of appellant, also a married man, and man of family, living on farms in Jasper County. Their relations as neighbors were not disturbed until about one year prior to bringing of this suit. From the year of 1911 different witnesses testify to circumstances and meetings between Lucinda S chiller and appellant that tend to prove the charge in this case down to September 6, 1913. Upon the trial there was a verdict and judgment in favor of appellee and against appellant for sum of $1,000.00.

Five errors in the admission of evidence and the refusal of Court to give defendant's instruction are argued by appellant to obtain a reversal of this case.

1. The proof under the pleadings as to time of alleged acts of intercourse was not confined to time alleged in declaration.

2. There was no proof of the charge of seduction and the intercourse was the result of connivence of appellee.

3. The incompetency of declaration and promise of wife of appellee to prove the issues.

4. The admissibility of evidence tending to prove bad conduct of appellee.

5. The refusal by the Court of an instruction offered by appellant under the second count of declaration limiting appellee's right to recover to substantially the time, place and under the circumstances alleged in appellee's declaration.

Upon the first error argued the declaration in both counts alleged that the intercourse took place, on to-wit: June 1st, 1913, and divers other days between that day and the commencement of this suit. By inference appellant admits that if declaration had said, on to-wit: June 1st, 1913, and divers oth-

with a family of children. They were neighbors for about fifteen years of appellant, also a married man, and one of family, living on farm in Jasper County. Their relations as neighbors were not disturbed until about one year prior to bringing of this suit. From the year of 1911 different witnesses testify to arguments and meetings between Jacinda S Schiller and appellant that tend to prove the charge in this case down to September 6, 1913. Upon the trial there was a verdict and judgment in favor of appellee and against appellant for sum of $1,000.00.

Five errors in the admission of evidence and the refusal of court to give defendant's instructions are argued by appellant to obtain a reversal of this case.

1. The proof under the pleadings as to time of alleged acts of intercourse was not confined to time alleged in declaration.

2. There was no proof of the charge of seduction and the intercourse was the result of promiscuous of appellee.

3. The incompetency of declaration and promise of wife of appellee to prove the lawyer.

4. The admissibility of evidence tending to prove bad conduct of appellee.

5. The refusal by the Court of an instruction offered by appellant under the second count of declaration limiting appellee's right to recover to substantially the time, place and under the circumstances alleged in appellee's declaration.

Upon the first error argued the declaration in both counts alleged that the intercourse took place, on to-wit: June 1st, 1913, and divers other days between that day and the commencement of this suit. By inference appellant admits that declaration had said, on to-wit: June 1st, 1913, and divers oth-

er days, etc., then appellee would not have been limited in time except by the statute of limitations, but because he followed the date given with the words "and on divers other days between that date and the commencement of the suit" he had made the time something that it was not without the use of these words; material and if material it must be proven as alleged.

The office of a videlicet is to particularize or explain what goes before, in this case; time is not the essence of the matter in issue, so that it need not be proven strictly as laid.

The averment under videlicet does not make subject matter immaterial, that is in fact material, neither does an averment, not under videlicet make material that which would otherwise be immaterial, Clycopedia of Law & Procedure, Vol. 31, Page 705.

We must determine from a reading of the declaration that which is material and that which is immaterial and the evidence should be admitted accordingly.

The charge and the right to recover in this case was upon the theory that appellant by a certain course of conduct with the wife of appellee had caused her to violate her marriage contract damaging and injuring appellee in the loss of her society and affection which he was entitled to under the contract, and that this suit was brought for carnally knowing appellee's wife and acts of intercourse the time when he carnally knew her, or had intercourse with her is a secondary matter to his right to recover, if within the statute of limitations and during the existence of marriage contract.

By an averment under a videlicet the pleader expresses himself to not be bound or restricted to positive and minute proof of the date alleged. Chitty on pleading Vol. 1 Pag.316.

or days, etc.. then appellee would not have been limited in time except by the statute of limitations, but however in fixing the date given with the words "and on divers other days between that date and the commencement of the suit" he had made the time something that it was not without the use of these words; material and if material it must be proven as alleged.

The office of a videlicet is to particularize or explain what goes before, in this case; time is not the essence of the matter in issue, so that it need not be proven strictly as laid.

The averment under videlicet does not make subject matter immaterial, that is in fact material, neither does an averment, not under videlicet make material that which would otherwise be immaterial, Encyclopedia of law & Procedure, Vol. 23, Page 702.

We must determine from a reading of the declaration that which is material and that which is immaterial and the evidence should be admitted accordingly.

The charge and the right to recover in this case was upon the theory that appellant by a certain course of conduct with the wife of appellee had caused her to violate her marriage contract damaging and injuring appellee in the loss of her society and affection which he was entitled to under the contract, and that this suit was brought for actually knowing appellee's wife and acts of intercourse the time when he carnally knew her, or had intercourse with her is a secondary matter to the right to recover, if within the statute of limitations and during the existence of marriage contract.

By an averment under a videlicet the pleader undertakes himself to not be bound or restricted to positive and minute proof of the date alleged. Chitty on pleading Vol. 1 Sec.318.

Under an averment on June 1st, 1913, one act of intercourse might be proven even not on date alleged either anterior or subsequent thereto. The averment by continuando ought not to place appellee in a worse situation than if one act of intercourse had been laid. Chitty on pleading, Vol. 1 Sec. 394.

This proposition is sustained by the great weight of authority, where the averment is not under videlicet because the date is not within itself matter material. The fact that the averment is made by continuando as to date does not change the materiality or immateriality of dates.

This is in accord with the weight of authority and practice as we now have it from the common law and under the statute, and the Court did not commit error in permitting proof of intercourse upon dates prior to June 1st, 1913, and within statute of limitations.

Under the second proposition that there was no proof of seduction the evidence properly admitted, tends to prove appellant the aggressor and if there is evidence tending to support the verdict and upon which a verdict could stand, the credibility of the witnesses as to whether or not appellant enticed the wife of appellee and was responsible for her wrong doing, or whether appellee through connivance or otherwise brought it about are questions of fact for the jury.

The third proposition the incompetency of declarations and promises of the wife made to appellee that her conduct would in future be proper, admitted by the Court is not free from criticism. The evidence under the case of Mueller vs. Knollenberg, 161 App., 107, was held incompetent and reversible error. That xxx it was incompetent and error in this case. The question of whether or not in the case at bar it was reversible error is the

Under an averment on June 1st, 1913, one act of intercourse might be proven even not on date alleged either anterior or subsequent thereto. The averment by continuando ought not to place appellee in a worse situation than if one act of intercourse had been laid. Chitty on pleading, Vol. 1 Sec. 384.

This proposition is sustained by the great weight of authority, where the averment is not under videlicet because the date is not within itself matter material. The fact that the averment is made by continuando as to date does not change the materiality or immateriality of dates.

This is in accord with the weight of authority and practice as we now have it from the common law and under the statute, and the Court did not commit error in permitting proof of intercourse upon dates prior to June 1st, 1913, and within statute of limitations.

Under the second proposition that there was no proof of seduction the evidence properly admitted, tends to prove appellant the aggressor and if there is evidence tending to support the verdict and upon which a verdict could stand, the credibility of the witnesses as to whether or not appellant enticed the wife of appellee and was responsible for her wrong doing, as whether appellee through connivance or otherwise brought it about are questions of fact for the jury.

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question for our determination. In the case of Mueller vs. Knollenberg, Supra, $2,000.00 damages were allowed.

The evidence as to intercourse was all circumstantial and the evidence was that the wife had procured prior to that time a divorce against appellee on the grounds of cruelty so that the damages allowed were largely punitive, therefore the reason for holding the evidence harmful.

In this case the evidence is not all circumstantial. The evidence of Nily Schiller as to what occurred in hay loft between appellant and the wife of appellee if true could not be called circumstantial and it is not denied by appellant. The undisputed evidence in this case shows that appellant carnally knew the wife of appellee and tends to prove the charge of seduction. The damages are not said to be excessive if appellant is liable in this case the admission of the evidence in the re-direct examination brought about by a recall of appellee for further cross examination upon the subject as to whether he was at the time living with his wife was not reversible error.

It is also the law of this State established by decisions of the Supreme Court beginning with the case of Rea vs. Tucker, 51 Ill., 110, and of this Court in the case of Browning vs, Jones, 52 App., 597, that evidence offered on behalf of defendant of adulterous conduct of plaintiff is competent not as a bar to the action but in mitigation of damages. The question under the fourth proposition therefore is not Was such evidence competent? but was there any evidence properly offered and tendered on behalf of appellant.

The only offer of this kind disclosed by the record is a question propounded by counsel for appellant to witness Ore.

question for our determination. In the case of Mueller vs. Tooll-above, supra, $8,000.00 damages were allowed.

The evidence as to intercourse was all circumstantial and the evidence was that the wife had procured prior to that time a divorce against appellee on the grounds of cruelty so that the damages allowed were largely punitive, therefore the reason for holding the evidence barmful.

In this case the evidence is not all circumstantial. The evidence of Billy Schiller as to what occurred in hay loft between appellant and the wife of appellee if true could not be called circumstantial and it is not denied by appellant. The undisputed evidence in this case shows that appellant actually knew the wife of appellee and tends to prove the question of seduction. The damages are not said to be excessive if appellant is liable xx in this case the admission of the evidence in the re-direct examination brought about by a recall of appellee for further cross examination upon the subject as to whether he was at the time living with his wife was not reversible error.

It is also the law of this State established by decisions of the Supreme Court beginning with the case of Rea vs. Tucker, 31 Ill., 110, and of this Court in the case of Browning vs. Jones, 32 App., 297, that evidence offered on behalf of defendant of adulterous conduct of plaintiff is competent not as a bar to the action but in mitigation of damages. The question under the fourth proposition therefore is not was such evidence admissible but was there any evidence properly offered and rendered on behalf of appellant.

The only offer of this kind disclosed by the record is a question proponded by counsel for appellant to witness ---

Bess Murray. Q. What, if anything, do you know with reference to his(referring to appellee) attempts at illicit conduct with you? Objected to - objection sustained. Same question to same witness as to conduct with mother of witness. Same objection and same ruling. The questions did not call upon the witness to answer whether or not appellee had ever attempted to have illicit relations with her or her mother, but for an answer as to what she knew about it. What she knew might have been direct and positive testimony or mere hearsay evidence. In this state of the record to overcome the presumption that the ruling of the trial Court was right, the bill of exceptions must affirmatively show what appellant claims the answer would be so that it can be determined that the ruling was prejudicial error. Ittner Brick Co. vs. Ashby, 198 Ill., 565; 179 App., 364; 182 App., 631. Because from the record in this case it is not made to appear that the evidence offered was competent and if competent its exclusion harmful to appellant, The evidence would only be competent in mitigation of damages and no complaint is made by appellant that the damages were excessive. It was not error to refuse to permit witness Mrs. Bess Murray to answer the questions.

We have held under proposition number one that acts of intercourse might be proven at any time prior and subsequent to the date alleged in the declaration, within statute of limitations. Therefore the refusal by the Court of appellant's instruction limiting the jury to substantially the date alleged in the declaration was proper. This is conceded by counsel for appellant if this Court failed to agree with counsel for appellant on proposition one.

We find no reversible error in this record and the judgment will be affirmed.

Affirmed.

(Not to be reported in full.)

Rose Murray. Q. What, if anything, do you know with reference to his(referring to appellee) attempts at illicit conduct with your? Objected to - objection sustained. Same question to same witness as to conduct with mother of witness. Same objection and same ruling. The questions did not call upon the witness to answer whether or not appellee had ever attempted to have illicit relations with her or her mother, but for an answer as to what she knew about it. What she knew might have been direct and positive testimony or mere hearsay evidence. In this state of the record to overcome the presumption that the ruling of the trial Court was right, the bill of exceptions must affirmatively show what appellant claims the answer would be so that it can be determined that the ruling was prejudicial error. Illinois Brick Co. vs. Reddy, 199 Ill., 548; 19 App., 564; 182 A pp., 631. Because from the record in this case it is not made to appear that the evidence offered was competent and if competent its exclusion harmful to appellant. The evidence would only be competent in mitigation of damages and no complaint is made by appellant that the damages were excessive. It was not error to refuse to permit witness Mr. Rose Murray to answer the questions.

We have held under proposition number one that acts of intercourse might be proven at any time prior and subsequent to the date alleged in the declaration within statute of limitations. Therefore the refusal by the Court of appellant's instruction limiting the jury to substantially the date alleged in the declaration was proper. This is conceded by counsel for appellant if this court failed to agree with counsel for appellant on proposition one.

We find no reversible error in this record and the judgment will be affirmed.

AFFIRMED.

(Not to be reported in full.)

I, A. C. MILLSPAUGH, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this fourteenth *day of* ~~October~~ November *A. D.* ~~1913.~~ 1914

A C Millspaugh

Clerk of the Appellate Court.

NOINI

20600

THE CINCINNATI EXHIBITION COMPANY, a corporation,
Appellee,

vs.

GEORGE H. JOHNSON,
Appellant.

Appeal from
Superior Court,
Cook County.

190 I.A. 630

MR. JUSTICE BAKER DELIVERED THE OPINION OF THE COURT.

This is an appeal by Johnson as defendant from an interlocutory order denying his motion to dissolve an injunction granted to complainant, The Cincinnati Exhibition Company, restraining him from performing or playing base ball for any person or corporation other than complainant during the season of 1914 and 1915. The contract contains the following provisions:

"7. The Club may, at any time after the beginning and prior to the completion of the period of this contract, give the player ten days' written notice to end and determine all its liabilities and obligations hereunder, in which event the liabilities and obligations undertaken by the Club shall cease and determine at the expiration of said ten days; the player at the expiration of said ten days shall be freed and discharged from all obligation to render service to the Club. If such notice be given to the player while 'abroad' with the Club, he shall be entitled to his traveling expenses, including Pullman accommodations and meals en route to the City of Cincinnati.

8. The player agrees to perform for the Club and for no other party during the period of this contract (unless with the written consent of the Club) such duties pertaining to the exhibition of the game of baseball as may be required of him as said Club, at such reasonable times and places as said Club may designate for the National League seasons for the years 1914 and 1915, beginning in April, 1914, and April, 1915, and ending in October, 1914, and October 1915, unless sooner terminated in accordance with other provisions hereof."

The defendant took a course of training at the expense of complainant in February and March, 1914, and played with the complainant Club from April 14 to April 20, and the

[illegible]

[illegible]

GEORGE H. JOHNSON,

[illegible]

[illegible]

MR. LUCIFER WADE [illegible] THE DETROIT TIGERS.

This is an appeal by Johnson to Detroit [illegible] an insubordinatory order requiring his motion to [illegible] an immediate penalty to complainant. The Dinotmont Athletic Company, restricting him from patronizing or playing onto [illegible] for any period of consideration o [illegible] than complainant during the season of 1911 and 1912. The contract contains the following provisions:

"V. The Club may, at any time after the expiration and prior to the completion of the period of this contract, give the player ten days' written notice to any and [illegible] the all its liabilities and obligations hereunder, in which event the liabilities and obligations [illegible] by the Club shall cease and terminate at the expiration of said ten days, the player at the expiration of said ten days shall be [illegible] and discharged from all obligation to render [illegible] to the Club. If such notice is given to the player while [illegible] with the Club, he shall be entitled to his travelling expenses, including Pullman accommodations [illegible] on route to the City of Cincinnati.

B. The player agrees to perform for the Club and for no other party during the period of this contract (unless with the written consent of the Club) such duties pertaining to the exhibition of the game of baseball as may be required of him as said Club, at such reasonable times and places as said Club may assignedle for the National League and some for the years 1912 and 1913, beginning on April, [illegible], April, 1913, and ending in October, 1913, and further [illegible] unless sooner terminated in accordance with other provisions hereof."

The defendant [illegible] a course of training at the [illegible] of commencement in February and March, 1911, and [illegible] with the complainant [illegible] from April 1st to April 15, [illegible]

next day signed a contract to play with a Club of the Federal League, a rival organization. We think that clause 8 of the contract contains a negative covenant that the defendant will not perform for any club other than complainant without the consent of complainant, and that the nature of the services defendant agreed to perform was so unique and of such a character as to bring the case, in the absence of special circumstances, within the rule stated in Lumley v. Wagner, 1 DeG. M. & G. 618.

The chief contention of appellant is that because the contract contains a provision that the Club may give the defendant, the player, ten days written notice to end and determine all its liabilities under the contract, in which event the liabilities and obligations of the Club shall cease and the player be freed and discharged from all obligation to render service to the Club at the expiration of said ten days, the contract is so wanting in mutuality that defendant, being free from personal bar, could not specifically enforce the covenants of complainant, and the complainant cannot therefore enjoin a breach of a negative covenant of the player. Counsel for appellant rely on the case of Ulrey v. Keith, 237 Ill. 284, as decisive in favor of their contention. In that case the Keiths executed to Ulrey oil and gas leases in certain lands owned by them in severalty. Ulrey assigned an interest in such leases to the Illinois Oil and Gas Company, a corporation. In a suit by Ulrey and the corporation against the lessors to enjoin a breach of the covenant of the leases it was held that complainants had a right to enter on any part of the lands except twenty acres which were found to be occupied by the Keiths as a homestead, and enjoined the defendants from interfering with or preventing the complainants from entering on and developing said lands for oil and gas, and the defendants appealed.

not any signed a contract to play with a club of the Federal League, a rival organization. We think that clause 3 of the contract containing a negative covenant that the defendant will not perform for any club other than complainant without the consent of complainant, and that the nature of the services to be rendered to perform was so unique and of such a character as to make the case, in the absence of special circumstances, within the rule stated in Lumley v. Wagner, 1 DeG. M. & G. 604.

The chief consideration of appellant is that because the contract contains a provision that the Club may give the defendant, the player, ten days written notice of and determine all its liabilities under the contract, in that event the liabilities and obligations of the Club shall cease and the player is freed and discharged from all obligation to render service to the Club at the expiration of said ten days, the contract is so lacking in mutuality that defendant, being free from performance, could not specifically enforce the covenants of complainant, and the complainant cannot therefore obtain a breach of a negative covenant of the player. Counsel for appellant rely on the case of Lilly v. Smith, 177 Ill. 554, as decisive in favor of their contention. In that case the lessee assented to Lilly oil and gas leases in certain lands owned by them in severalty. Lilly assigned the instrument in such leases to the Illinois Oil and Gas Company, [illegible] tion. In a suit by Lilly and the corporation against the lessees to enjoin a breach of the covenant of the leases it was held that complainants had a right to enter on any part of the lands described in the leases which were found to be occupied by the lessees and [illegible] abandoned, and enjoined the defendants from interfering with [illegible] preventing the complainants from entering on the lands [illegible] lands for oil and gas, and the defendants appealed.

One of the grounds urged for reversal of the decree as stated in the opinion was, "that an injunction restraining the breach of a contract is a negative enforcement of it, and that as the lease contained a clause by which appellees were authorized to surrender it at any time, specific performance of it would not have been decreed in favor of appellants, and therefore the negative enforcement of it will not be decreed in favor of appellees. This proposition was the only one the Court deemed it necessary to consider, for the reason, as stated in the opinion, that, "conceding the decree to be otherwise supported by the law and the facts, this question is decisive of the case." The court then declares that a suit to enjoin the violation of a contract is governed by the same rules as a suit for specific performance; that while the decisions of the various courts of this country on that question are not harmonious, the Supreme Court of Illinois is committed to the application of the same rule in both cases. In the opinion a large number of cases are examined in which specific performance was sought, among them Marble Co. v. Ripley, 10 Wall. which it is said, "is a leading case on the subject of specific performance. In that case it was said: "Another reason why specific performance should not be decreed in this case is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the marble company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might, in itself, be free from the difficulty attending its execution in the former."

One of the grounds urged for reversal of the decree
a minority in the opinion was, "that an injunction restraining the
breach of a contract is a negative enforcement of it, and that as
the issue concerned a clause by which appellants were restrained
to remember it at any time, specific performance of it might not
have been decreed in favor of appellants, and therefore the negative
enforcement of it will not be decreed in favor of appellees. This
proposition was the only one the Court deemed it necessary to con-
sider, for the reason, as stated in the opinion, that, "concerning
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not harmonious, the Supreme Court of Illinois is committed to the
application of the same rule in both cases. In the opinion a
large number of decisions are examined in which specific performance
sought, among them Merritt Co. v. Higley, 10 Week. Dec. 1. In such
"is a leading case on the subject of specific performance." In that
case it was held: "Another reason why specific performance should
not be decreed in this case is found in the want of mutuality.
Such performance by Higley could not be decreed on enforcing it the
suit of the Merritt company, for the contract unmistakably stipulates
that he may relinquish the business and remain in the employment of
the company during one year's notice. Men is in a general principle
that when, from general incompetent, the character of the contract,
or any other cause, a contract is impossible of being enforced
against one party, that party is equally incapable of enforcing
it specifically against the other; though in exceptions in the
latter may right, in itself, differs from the relatively affecting
the proposition in the former."

As stated by Fry, Specif. Perf., Sec. 286, ed. 1890, 440, p. 314: "A contract, to be specifically enforced by the court, must be mutual; that is to say, such that it might at the time it was entered into have been enforced by either of the parties against the other of them. Whenever, therefore, whether from personal incapacity, the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other." And, again, "A contract that is sought to be specifically enforced must be mutual both as to the remedy and the obligation. A party not bound by the agreement itself has no right to call upon a court of equity to enforce specific performance against the other contracting party by expressing his willingness in his will to perform his part of the engagement. His right to the aid of the court does not depend upon his subsequent offer to perform the contract on his part, but upon its original obligatory character." The court then proceeds to examine the authorities in cases where it was sought to enjoin the breach of the contract, and examnines Gas Co. v. Town of Lake, 130 Ill. 42; Railroad Co. v. East St. Louis, 182 id. 433; Welty v. Jacobs, 171 id. 624; Cleveland v. Martin, 218 id. 73; Watford Co. v. Shipman, 233 id. 9.

The court, following Watford Co. v. Shipman, supra, held that where a provision in an oil lease gave the lessee the option of surrendering the lease at any time on the payment of one dollar, there was a want of mutuality of remedy, and because thereof a court of equity would not enjoin a breach of the lease at the suit of the lessee, and quoted with approval from the Watford case the following: "A court of equity will not do a vain and useless thing by rendering a decree which one of them may set aside at his will."

The question presented in this case, as in Ulrey v. Keith, is not as to the validity of the contract, but whether equity will interfere to prevent its violation. In the Ulrey

As stated by Fry, Pooll. Pat., Lec. Ch. M. Lect., and, p. 311: "A contract, to be specifically enforced by the court, must be mutual; that is to say, such that it might at the time it was entered into have been enforced by either of the parties against the other of them. Whenever, therefore, whether from personal incapacity, the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other." And, again, "A contract which is sought to be specifically enforced must be mutual both as to the remedy and the obligation. A party not bound by the agreement itself has no right to call upon a court of equity to enforce specific performance against the other contracting party by expressing his willingness in his will to perform his part of the engagement. His right to the aid of the court does not depend upon his subsequent offer to perform the contract on his part, but upon his original willingness to perform." The court then proceeds to examine the authorities in order to see how far the rule of the mutuality of the contract, and [illegible] v. Tom of Tom, 100 Ill. 44; Hallowell Co. v. Inc Rt. Lumber, 100 Ill. [illegible] [illegible] Wigmore, 3d Ed. [illegible].

The court, following Wetherd Co. v. Wright, [illegible] holds that where a provision in an old lease gives the lessee the option of surrendering the lease at any time on the payment of one dollar, there was a want of mutuality of remedy, and consequently of a court of equity would not enjoin a forfeiture of the lease at the suit of the lessee, and quotes with approval from the [illegible] the following: "A court of equity will not do [illegible] thing by rendering a decree which one of the parties may [illegible] at his will."

The question presented in this case, as it [illegible] Smith, is not as to the validity of the contract, but [illegible] [illegible] to prevent its [illegible]. In the [illegible]

case it was said: "It should be borne in mind that there is a distinction in equity between a mutuality in the obligations of contracts and a mutuality of remedy under them. As stated by Cooley, J., in Rust v. Conrad, supra. Denying specific performance does not deny the legality or obligation of a contract; it denies merely that the case is one of equitable cognizance." In Poe v. Ulrey, 233 Ill. 56, it washeld that a surrender clause similar to the clause in Ulrey v. Keith did not invalidate the lease; that while the lessee had the right to surrender, the lessor could not compel a surrender, but that it did not follow that to hold the lease a valid contract necessarily implied or carried with it the right to enjoin the lessors from violating it.

In the opinion of the majority of the court the provision in the contract by which the Club by giving notice could end and determine all the liabilities undertaken by the Club under the contract is a fatal objection to the right of the Club to enforce by injunction the performance by Johnson of his negative covenant not to play or perform for any one other than the Club. We are not able to distinguish this case from Ulrey v. Keith, supra, nor to perceive any ground on which it can be held in that case that a court of equity will not enjoin a violation of covenants of a lease by the lessors for want of mutuality of remedy because of the provision that the lessees might surrender the lease at any time, and that in this case, where a like right to terminate the contract was reserved to the Club it is entitled to an injunction against Johnson. We see no reason why any different rule should govern where an employer who has reserved the right to terminate the contract of employment seeks to enjoin the breach of a covenant by the employee not to serve another, from that which governs in other cases, when a party who has reserved such a right seeks the aid of a court of equity to enjoin a breach of some other negative covenant by the other party to the contract.

case it was said: "It should be borne in mind that there is a distinction in equity between a mutuality in the obligations of contracts and a mutuality of remedy under them. As stated by Cooley, J., in Rust v. Conran, supra. Denying specific performance does not deny the legality or obligation of a contract; it denies merely that the case is one of equitable cognizance." In Pee v. Ulrey, 833 III. 58, it appears that a surrender clause similar to the clause in Ulrey v. Keith did not invalidate the lease, that while the lessee has the right to surrender, the lessor could not compel a surrender, but that it did not follow that to hold the lease a valid contract necessarily implied or carried with it the right to enjoin the lessors from violating it.

In the opinion of the majority of the court the provision in the contract by which the Club by giving notice could end and determine all the liabilities undertaken by the Club under the contract is a total objection to the right of the Club to enforce by injunction the performance by Johnson of his negative covenant not to play or perform for any one other than the Club. We are not able to distinguish this case from Ulrey v. Keith, supra, nor to perceive any ground on which it can be held in that case that a court of equity will not enjoin a violation of covenants of a lease by the lessors for want of mutuality of remedy because of the provision that the lessee might surrender the lease at any time, and that in this case, where a like right to terminate the contract was reserved to the Club it is entitled to an injunction against Johnson. We see no reason why any different rule should govern where an employer who has reserved the right to terminate the contract of employment seeks to enjoin the breach of a covenant by the employee not to serve another from that which governs in other cases, when a party who has reserved such a right seeks the aid of a court of equity to enjoin a breach of some other negative covenant by the other party to the contract.

The conclusion thus stated is in accordance with the decisions of the court in Brewing Co. v. Modzelewski, 183 Ill. App. 352; Bour v. I. C. R. R. Co., 176 id. 185, and Robinovich v. Keith, 120 id. 409.

The order denying defendants' motion to dissolve the injunction is reversed and the Superior Court is directed to enter an order dissolving the injunction heretofore ordered and issued in the cause.

REVERSED WITH DIRECTIONS.

Mr. Justice McSurely dissents.

190 A 632

308 - 18771

ISADORE B. SIMCO, Defendant in Error,	)	
vs.	)	ERROR TO MUNICIPAL COURT OF CHICAGO.
MORRIS M. MANKOWITZ, Plaintiff in Error.	)	

190 I.A. 632

MR. PRESIDING JUSTICE F. A. SMITH
DELIVERED THE OPINION OF THE COURT.

A judgment by confession for $125 was entered in the Municipal Court of Chicago in favor of defendant in error against plaintiff in error on a promissory note and power of attorney authorizing the entry of judgment, and a cognovit confessing judgment on the note, on June 13, 1912. Plaintiff in error, on August 29, 1913, presented his motion to set aside and vacate the judgment. The motion was based on a petition and affidavit. The motion was denied.

The court was without power to entertain the motion and petition, more than thirty days having elapsed after the entry of judgment.

The judgment is affirmed.

AFFIRMED.

B - Jed. Nov. 4/13.

308 - 18771

ISADORE B. SIMCO, Defendant in Error, vs. MORRIS M. MANKOWITZ, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE SMITH DELIVERED THE OPINION OF THE COURT.

On June 13, 1912, a judgment by confession was entered in the Municipal Court of Chicago on a warrant of attorney authorizing the confession of a judgment in favor of defendant in error and against plaintiff in error.

August 29, 1912, plaintiff in error presented his motion to set aside and vacate the judgment and for leave to defend against the action. This motion was founded upon a petition supported by the affidavit of plaintiff in error. The motion to vacate the judgment and for leave to defend was denied by the court and plaintiff in error brings the judgment or order of court, denying him the right to plead to the merits, before this court for review.

The plaintiff in error, in his petition to the Municipal Court, sets up the ex parte proceedings resulting in the judgment, and that they were had without any knowledge of the plaintiff in error; that at the time of the execution and the delivery of the judgment note to C. E. Huxley and at the time of the pretended transfer thereof to Isadore B. Simco, defendant in error, said Huxley was the agent for defendant in error, and that all the equities and defenses of the maker of the note exist against the defendant in error as the principal

B - Jd. 1/13/14.

Additional Opinion filed 1/13/14.

of his agent, and that defendant in error was not at the time he received said note an innocent purchaser thereof for value before maturity, but that he well knew of and was a party to the fraud perpetrated upon the plaintiff in error in the obtaining of the note; that the plaintiff in error had a valid and meritorious defense to the action of the defendant in error upon said note, namely, that the note was obtained by fraud and misrepresentation of the defendant in error and his agent Huxley, to and in that behalf, and was wholly without consideration and void; that the note on which the judgment was entered was given as a part purchase price for a White Steamer automobile owned by defendant in error, which was sold by C. E. Huxley to the plaintiff in error as the agent of defendant in error on April 2, 1912, upon the representation and express warranty that the automobile was in perfect running order and in first-class repair and condition for immediate use; that the representations of the defendant in error, through his agent Huxley, regarding the automobile were false, and that the defendant in error directed them to be made by his agent Huxley, and both the defendant in error and his agent knew them to be false; that the automobile, instead of being in perfect running order and in first-class repair and condition for immediate use, was wholly out of repair, defective, could not be operated and would not run; that the cylinder was cracked and the valves out of adjustment.

The petition further states that at the time of the sale of the automobile to plaintiff in error, the plaintiff in error was not familiar with automobiles and so informed the defendant in error through his agent Huxley, and plaintiff in error wholly relied upon the representations of defendant in error's agent as to the condition of the automobile; that, in addition to delivering to defendant in error's agent the judgment note for $125 sued on, plaintiff in error paid the defendant in error $175

in cash, and relying upon the warranty of defendant in error as aforesaid, that he would make good to the plaintiff in error all that plaintiff in error expended in re airs of the automobile, plaintiff in error expended in repairs on said automobile the sum of $150.06; that all of the repairs were necessary to place the machine in running condition as warranted by the defendant in error, and that no part of said sum of $150.06, paid out by the plaintiff in error, was ever refunded to him by defendant in error or any person for him.

The petition further alleges that the plaintiff in error notified the defendant in error of the breach of warranty in the automobile before the maturity of the note, and that the defendant in error promised that everything would be made satisfactory, but that instead of making his warranty good, the defendant in error, conspiring with his agent, Huxley, caused the note to be endorsed by Huxley to him, and inequitably and unjustly caused the judgment to be confessed thereon.

The facts set up in the petition presented equitable grounds for the relief asked in the petition, and the Municipal Court should have allowed the plaintiff in error to plead to the merits and defend against the action.

Section 21 of the Municipal Court Act gives to that court power and authority, after the lapse of thirty days from the entry of a judgment, to vacate it on petition setting forth facts which would be sufficient to cause the same to be vacated in a court of equity. Plaintiff in error was not guilty of any undue delay in presenting his application to the Municipal Court, and that court, having authority over judgments by confession given under Section 21 above referred to, should have permitted the plaintiff in error to defend against the action.

For the error in refusing to open up the judgment and give plaintiff in error leave to make defense the judgment or order is reversed and the cause remanded.

REVERSED AND REMANDED.

361 - 19366

SARAH A. COAN,
Appellant,

vs.

MICHAEL J. COAN,
Appellee.

Appeal from
Circuit Court,
Cook County.

190 I.A. 633

MR. JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

On June 24, 1910, Sarah A. Coan, complainant, filed her bill of complaint in the Circuit Court of Cook County for separate maintenance against her husband, Michael J. Coan, defendant, charging extreme and repeated cruelty and alleging that on June 9, 1910, she was compelled to and did leave defendant and live separate and apart from him, without her fault, and praying for the custody of two of their three male children. The defendant filed an answer denying the charges of cruelty, and also filed a cross-bill alleging that complainant had been guilty of habitual drunkenness for the space of more than two years and that she was not a fit person to have the care and custody of any of said children, and praying for a divorce and the custody of said children. In her answer to the cross-bill complainant denied the charge of habitual drunkenness, denied that she was not a fit person to have the custody of the children and denied that defendant was entitled to a divorce. The cause was heard before the chancellor on February 18th and 19th, 1913. Seven witnesses, including complainant, testified in her behalf, and eight witnesses, including defendant, testified in his behalf.

On March 3, 1913, the court entered a decree finding that the defendant had not been guilty of extreme and repeated cruelty to complainant, that she was not and has not been living separate and apart from the defendant without her fault, and that

complainant had been guilty of habitual drunkenness, and decreeing that complainant's bill be dismissed for want of equity, that the bonds of matrimony existing between the parties be dissolved, that the defendant have the care and custody of the three children until the further order of the court, and that defendant pay $18 per month until the further order of the court, as alimony, to Mrs. M. J. Walsh, for the use and benefit of complainant, and also pay $35 to complainant as a solicitor's fee.

On March 18, 1913, the complainant appeared by her solicitor, other than the one who tried the cause, and entered her motion to set aside and vacate said decree, and the motion was continued until the next term of court. On March 31st she filed a petition accompanied by various affidavits in support of said motion. Certain amendments to the petition were subsequently made and other affidavits filed. On May 12, 1913, the court denied the motion to set aside and vacate said decree and entered an order allowing an appeal from said decree to this court, and also from "the order of the court denying a new trial of said cause," upon complainant filing her individual bond in the sum of $250 and a certificate of evidence within a specified time. The appeal was subsequently perfected, and the complainant here urges that the court erred in entering said decree, because the findings are against the weight of the evidence, and further that the court erred in denying said motion to vacate the decree.

We have carefully examined this somewhat voluminous record, and have reached the conclusion that the decree should be affirmed. No useful purpose would be subserved by making a detailed review of the testimony of the many witnesses heard in open court by the chancellor. Suffice it to say that, in our opinion, the decree is not contrary to the weight of the evidence. Where the evidence is conflicting upon a trial had in open court the finding of the chancellor has the same force and effect in a re-

turbed or set aside unless it is palpably against the weight of the evidence. (Coari v. Olsen, 91 Ill. 573; Greenwood v. Fenn, 136 Ill. 148.) And we do not think that the court erred in refusing complainant's motion to vacate and set aside the decree.

The decree of the Circuit Court is affirmed.

AFFIRMED.

385 - 19338.

ELLA W. MAGEE, Appellant,	}	APPEAL FROM
vs.	}	CIRCUIT COURT,
JOHN J. MAGEE, Appellee.	}	COOK COUNTY.

190 I.A. 635

MR. PRESIDING JUSTICE BAUME DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court dismissing for want of equity, appellant's amended bill for divorce, charging appellee with cruelty and adultery. The cause was heard by the chancellor, without a jury. The only ground urged for a reversal of the decree is that, upon the evidence adduced, appellant established the averments of her bill and was entitled to a decree for divorce.

The parties became acquainted in 1890 or 1891, at which time appellant, who was about 33 years of age and who had procured a divorce from her former husband, was, with her two sons, living at the home of her parents. Appellee was then about 34 years of age, and owned and conducted a drug store in the vicinity of appellant's home. In 1892 appellee became a roomer or boarder at the home of appellant's parents and so continued until about two years subsequent to his marriage to appellant in 1898. In 1899, a son was born of the marriage. In 1901 the parties removed for a time to an apartment, but after the death of appellant's father in January, 1902, they resumed their residence at the home of appellant's mother, where they continued to reside until the filing of the bill herein. Upon the death of her father, who left an estate estimated at over $500,000, appellant, as his only child, inherited the same, subject to the rights of her mother. In March, 1902, owing to illness, appellee, at the suggestion of appellant, disposed of his drug store,

and did not again engage in active business until April, 1907, when he became associated in a business enterprise which required his presence and attention at Kansas City from 1907, to February, 1908, at Philadelphia from February, 1908, to January, 1910, and subsequently until December, 1910, at New York. From March, 1908, to April, 1907, appellee continued to live at the home of appellant and her mother, and assisted appellant in the management of her estate. In 1907, appellee borrowed from appellant $6,000, for the purpose of enabling him to procure an interest in the business enterprise which he then undertook. He gave appellant satisfactory security for this loan, and subsequently paid the same to appellant's attorney. During the time appellee was conducting his business at Kansas City, Philadelphia and New York, he made occasional visits to the family home at Chicago and appellant and their son made extended visits to appellee at the several other cities where appellee was employed and where they maintained the ordinary family relation. Appellant testified that her relations with appellee in 1907 were pleasant. The mother of appellant died in 1910. There is no suggestion in the record that the relations existing between appellee and the parents of appellant, during the life time of the latter, were other than cordial.

The first act of physical violence by appellee is claimed by appellant to have occurred in February, 1904. It is admitted that the parties then had some controversy concerning a very trifling matter, viz: the payment by appellee for the services of a plumber in cleaning a catch basin, which services appellant insisted had not been properly performed. Appellant testified that upon her refusal to leave the room and to cease discussion of the matter, appellee took hold of her between the arm and shoulder; that she got in between the door jambs and stood there; that he didn't get her out

and so choked her; that he took her by the neck and choked her, then he stopped instantly and she walked out. Referring to the same occasion appellee testified that appellant had repeatedly upbraided him and he told her he did not want to hear anything more on the subject; that he then took her by the arms and carried her out into the hall and shut the door; that he did not strike or choke her. The incident was not related by appellant to her mother and was not again referred to by appellant until she filed her bill seven years thereafter.

The second act of cruelty on the part of appellee is claimed to have occurred in 1930, upon an occasion when she went to the stable for the purpose of calling appellee to dinner. She testified that he then swept some dirt, water and manure from the stable floor all over her face, dress and hair. That this incident was greatly exaggerated by appellant is evident from the fact that, notwithstanding the claim that she was a high spirited, refined and sensitive woman, she forthwith seated herself at the dinner table and partook of the prepared meal, without removing the evidences of appellee's alleged cruelty from her person. The testimony of appellee satisfactorily explains the incident as wholly accidental. He further testified that upon observing a spot of dirt on her face, he attempted to wipe it off, but she resented his advances, and declared her purpose to sit at the table and eat, without wiping it off.

The third act of cruelty is claimed by appellant to have occurred on December 31, 1930, following a discussion about some business matter and the reading of a letter relative thereto. Appellant testified that appellee then took his hand and hit her on both sides of her face, knocked her glasses off, took hold of her arm and twisted it and forced her to sit down in a chair; that he then also took her by

the threat. Appellee denied the occurrence of any such incident.

The admitted conduct of appellant toward appellee and her proposals to him, shortly following the alleged incident of December 21, 1906, when he was contemplating going to Kansas City, are not entirely reconcilable with any feeling of resentment which would naturally be provoked in her, by his alleged mistreatment. She testified that she asked him not to go away from home; that she preferred to have him stay on account of their boy; that she offered, if he would stay at home to remunerate him as much as he could have saved out of his salary.

The fourth and last alleged act of cruelty on the part of appellee, which preceded the filing of the original bill, on October 30, 1911, is claimed to have occurred on October 26, 1911. The three prior acts of alleged cruelty were fully condoned by appellant, and may properly only be relied upon by her, if revived by the alleged conduct of appellee on October 26, 1911. Shortly prior to June, 1911, when appellant, accompanied by her son, went west, where she remained until October 11th following, she had kept the door of the bed room occupied by herself and son, locked at night and this custom was continued by appellant after her return. The conduct of appellant in this respect was resented by appellee, who, not improperly desired to have free access to the room occupied by his son, then about 13 years of age, and to whom appellee was much attached. There were repeated controversies about the subject between the parties. At dinner on the evening of October 26th, appellee directed or requested appellant to leave the door unlocked. The boy was subject to occasional attacks of indisposition, and was indisposed that evening. There is a conflict in the testimony of the parties as to what was then said by each of them.

Appellant testified that upon appellee's threat that he would break open the door if he found it locked, she said, "Well, I will." Appellee testified that appellant said she would do as she pleased about it and would continue to lock the door, and that he told her he would have to come right through then. Appellee went to the room to see his son, and then left the house, returning at about 10 o'clock. Upon his return he found the door locked and knocked on the door and demanded admission into the room. Appellant finally unlocked the door, whereupon appellee entered the room and attempted to "kill" or break the lock with his knife. Appellant resisted the continued efforts of appellee to injure the lock, and during such time appellant suffered a bruise on the side of her face, which within three or four days following showed slight marks of discoloration. Appellant testified that appellee's arm came around and struck her and threw her against the door. Again, in response to the question, "Did he push you or strike you?" she replied, "I cannot tell whether he took his hand, his elbow or his arm, but it was this way [indicating], something came up and struck me."

Appellee denied that he deliberately or consciously struck appellant, and appellant's recital of the affair is entirely consistent with the theory that the slight injury which she sustained, was occasioned accidentally.

The only substantive evidence in the record in support of the claim that appellee was guilty of adultery is the deposition of a common prostitute residing and plying her trade in the City of New York, which deposition she was induced to make at the direction of a man, as to whom she said, "I do everything he tells me to." She was a confessed victim of the cocaine habit, and the record of her testimony discloses that while under examination before the

Commissioner, she suffered a mental and nervous collapse, for lack of the drug. If her testimony had not been directly contradicted by appellee, it would, in the light of the surrounding circumstances, have been ineffectual to sustain the charge of adultery against him.

The record in the case is voluminous and embraces a recital of numerous facts and circumstances, relating to the conduct of the parties directly involved, and of others, with whom they were associated, before and subsequent to their marriage, which are not essential to a determination of the case upon its merits, and which for obvious reasons we have refrained from detailing.

We are not persuaded that the chancellor, who was in a better position than are we, to determine the credibility of the several witnesses and to weigh their testimony, erred in his conclusion that appellant had failed to establish her right to a decree for divorce. The decree is affirmed.

DECREE AFFIRMED.

372 - 19400.

Newman

WILLIAM L. NEWMAN, Administrator of the Estate of JAMES VERNON NOOK, Deceased,
Appellee,

vs.

BARBER ASPHALT PAVING COMPANY, a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

190 I.A. 636

MR. PRESIDING JUSTICE BRIEN
DELIVERED THE OPINION OF THE COURT.

This is a suit by appellee against appellant to recover damages for wrongfully causing the death of appellee's intestate, James Vernon Nook, aged six years, wherein there was a verdict and judgment against appellant in the Circuit Court for $4,750.00.

The case was submitted to the jury upon the first, second, third and fifth counts of the declaration. Each of said counts were in substance that appellant was in possession and control of and was using a certain team and wagon and load of binder or paving material, which were upon Lincoln street, a public highway in the city of Chicago, at or near the intersection of Jackson boulevard, and which were then and there in the custody and control of certain servants of appellant and under the direction of a certain foreman and driver of appellant.

The first count charges that it was the duty of appellant to use all reasonable care in and about the moving of said team, wagon and load, and in and about the management of the same, so as not to injure persons lawfully upon said public highway, but therein appellant wholly failed and made default, and on the contrary thereof, negligently and with knowledge or opportunity for knowledge by the use of reason-

able care, caused the said team, wagon, and load to be moved along said highway in such a manner that deceased, while lawfully upon said highway was struck, run down, run over, crushed and injured so that immediately thereafter he died, etc.

The second count charges that said team, wagon, and load, and the substance in the nature of tar contained in said load, were attractive to children and appealed to children curiosity and instinct to play with and in the making of balls of tar, and divers other ways, and while said team, wagon, and load were standing stationary upon said highway, and the deceased and other children of tender age were playing about said wagon and the load or contents thereof, appellant, by its servants, then and there so carelessly and improperly moved and managed said team, wagon, and load with knowledge or opportunity for knowledge in the exercise of reasonable care of the position in proximity of said team, wagon, and load of said deceased and of the danger to him and that by and through the negligence of appellant by its servants, in moving and managing the said team, wagon, and load, it was caused to run upon and over said deceased, etc.

The third count charges that it became and was the duty of appellant and its servants to use all reasonable care in and about the moving of said team, wagon and load, and in and about the management of the same upon said public highway so as not to injure persons lawfully upon said public highway and to warn and notify persons lawfully upon said public highway of its intention so to move and operate said wagon, team, and load, but, therein, the said defendant wholly failed and made default, and, on the contrary thereof, negligently and with knowledge or opportunity for knowledge by the use of reasonable care, caused the said team, wagon, and load to

be moved along said highway in a dangerous manner and without giving any warning of its intention so to move said team, wagon, and load, so that said deceased, while lawfully upon said public highway and who was then and there in close proximity to the said team, wagon, and load, was, without any warning to him of the intended moving of the said wagon, struck, run down, run over, and crushed and injured by reason of the starting and moving of said wagon by the defendant and its servants, as aforesaid, etc.

The fifth count charges that said team, wagon, and load and the contents of said wagon were attractive to children and appealed to childish curiosity and instinct and calculated to entice children of tender age to play with and around said wagon, team, etc., and while the said team, wagon, and load were standing stationary upon said highway, without guards or warnings or means to prevent children from being and playing around the same, said deceased, together with other children of tender age, was enticed by childish curiosity and instinct to play under and about said wagon, and while said deceased was under said wagon or in a position near the wheels of said wagon, appellant through its agents and servants, not exercising proper care and caution or safeguards, and with notice of the position of said deceased, or with opportunity for knowledge of his position by the exercise of reasonable care upon appellant's part, did then and there negligently move and cause to be moved said team, wagon, and load, without any warning or notice to said deceased, and without exercising care to prevent injury to said deceased, whereby, through the negligent conduct of appellant, by its servants, the said team, wagon, and load were caused to run upon and over said deceased, etc.

Appellant pleaded the general issue and a further plea denying ownership and operation, etc., which latter plea is not here involved.

On July 21, 1909, and for about two weeks prior thereto, appellant was engaged in paving Jackson boulevard near the intersection of Lincoln street, or in repairing the pavement there. The asphalt was hauled to the job in dump wagons drawn by horses, and was not unloaded until it was required to be spread upon the pavement. About 10 o'clock in the forenoon of the day named several wagon loads of asphalt were hauled to the place, where the work was in progress, and as the pavers were not then ready to spread all of the asphalt so then hauled, the drivers of the several wagons were directed to stop their teams and wait until called upon to dump their loads. Mooney, one of the drivers, stopped his team on the east side of Lincoln street, about 75 to 100 feet south of Jackson boulevard, so that his wagon stood about 3 feet from the curb. The horses were headed north and remained hitched to the wagon. Mooney got off his wagon and went to or near the southwest corner of the streets named, near which point other employees of appellant were then at work, and where other drivers had congregated, to await directions from the foreman, Luke, when and where to drive his team and unload his wagon. During the forenoon, after the wagon in question had stopped on Lincoln street, and while it was standing there, several boys, who lived in the immediate neighborhood, including the deceased, were playing on the east side of the wagon, sitting on the curb engaged in pulling out asphalt or tar, as they called it, with sticks or with their hands, from openings in the bed of the wagon and rolling it into balls. When the noon hour arrived, Mooney, who was then standing in the street, ten or fifteen feet from his team, was told by Luke to feed his team, as his wagon would not be unloaded until after dinner. As Mooney advanced toward his team, or while he took hold of his horses' heads for the purpose of leading them up, they moved forward two or three feet, and the right rear wheel of the wagon ran over the body of the deceased,

causing injuries which resulted in his death.

There is a conflict in the evidence regarding the occasion for the movement of the team and wagon at the time in question. The evidence offered by appellee tends to show that as Mooney approached the wagon he was carrying two nose-bags with which to feed the horses, and that when they saw the nose-bags, they started forward toward Mooney, while the evidence offered by appellant tends to show that the horses were not fed from nose-bags, but that the grain was kept in a box in the front end of the wagon from which the horses fed after they were unhitched from the wagon, and that the drivers employed by appellant were not provided with nose-bags; that when the wagon moved forward Mooney was at the heads of the horses for the purpose of leading them forward a few feet to a shaded portion of the street, where he proposed to unhitch and feed them. In view of the fact that the only count in the declaration which charged appellant with negligence in leaving the horses unfastened, while standing upon the street, was, on motion of appellee, withdrawn from the jury, it is unnecessary to determine the precise occasion for the movement forward of the team and wagon.

If, however, it might be held that the averments in the other counts of the declaration are sufficiently broad to charge a breach by appellant of a duty to fasten the horses when standing upon the street, a failure to perform that duty could not be held to be the proximate cause of the death of appellee's intestate, because the uncontroverted evidence shows that the horses did not move forward a greater distance than they might have moved, if they had been fastened, as horses are ordinarily fastened, when standing upon the street.

No case has been cited, and a careful search has disclosed none, wherein the doctrine of "attractive nuisances" has been extended to a team and wagon or other like vehicle

standing or moving upon the street, while many cases are to be found wherein the courts have expressly held that negligence, - that is, a failure to observe some duty - may not be predicated upon the mere presence upon the street of a team and wagon, either stationary or in motion. Chicago Consolidated Bottling Co. v. McGinnis, 51 Ill. App., 645; Conlon v. Bailey, 50 Ill. App., 321; Hubard v. Noble, 98 Ill. App., 543.

While the deceased by reason of his infancy was not chargeable with contributory negligence, no duty was imposed upon the servants of appellant in charge of the team and wagon to avoid injury to the deceased, under the circumstances disclosed by the evidence in this case, unless and until said servants knew, or had reason to believe that the deceased was in a position where he might be injured if the team was started forward.

There is no pretense that Mooney, the driver, saw the deceased or any of the other children at play around or under the wagon when the horses started forward, or that he had any knowledge of their presence near the wagon until he heard the deceased scream, and it is clearly established that when Luke, the foreman, directed Mooney to feed the horses, the boys were seated on the curb seat of the wagon, in a place of safety.

The accident and consequent death of appellee's intestate are inexpressibly regrettable, but in the absence of negligence on the part of the servants of appellant it cannot be held liable to respond in damages therefor.

The judgment is reversed with a finding of fact to be incorporated in the judgment of this court.

JUDGMENT REVERSED WITH FINDING
OF FACT.

FINDING OF FACT:

We find that appellant was not guilty of the negligence charged in the declaration.

163 - 19164.

ANTONIE POSPISIL,
Defendant in Error,

vs.

FRANK G. HAJICEK,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

190 I.A. 638

MR. JUSTICE DUNCAN DELIVERED THE OPINION OF THE COURT.

Defendant in error's judgment of $900 was rendered in a jury trial for the unpaid part of an alleged deposit of $1,800 made by her in Frank G. Hajicek's private bank, July 11, 1911.

Plaintiff in error, Hajicek, asks a reversal of the judgment, and insists that the evidence is insufficient to support it. The record evidence discloses that defendant in error and her husband were saloon keepers who usually kept a great deal of their money at their home, and were doing a profitable saloon business and were also keeping boarders, and that they were taking in from $50 to $100 a day. Both of them had had deposit accounts at the bank of plaintiff in error for years, and on August 10, 1910, defendant in error opened a new account in her name by then depositing in gold, currency and checks the sum of $1,800. She only made two deposits there after that date, one of $900, June 19, 1911, and the other July 11, 1911, and she never checked any of said moneys out of the bank up to January 13, 1913. On said last date she went to the bank to collect her interest, and Rudolph Hajicek, brother of plaintiff in error, calculated her interest at something over $60.00, and on informing her of the interest due she said it was not enough. He replied, "How much interest do you want on $2,100". She at once replied, "Lord, we have $3,000 here!" He then looked at the books of the bank and her pass book and told her, as she testified, "You

have your money here, $3,100 with interest." She asked him then to write it in her book, as she was then informed that her book did not show it. He testified that what he meant was that she and her husband both had over $3,000 there. He refused to credit her pass book further unless she would bring him some written evidence that she had made more deposits than her pass book showed. She and her daughter both testified very positively that on July 11, 1911, she deposited $1,200, $300 in gold and $900 in currency; that they both saw her husband count it the night before, and that on that day between 1 and 2 o'clock P. M. she carried it to the bank in her purse, the currency with a paper band around it marked "$900", as the husband had fixed it the night before, and the gold tied up in a handkerchief; that Rudolph Hajicek counted it, made an entry in her pass book, slipped it into an envelope and handed it to her; that she returned to the saloon, found a large crowd there, threw the pass book into a drawer, and never saw it any more until she went back for her interest as aforesaid. Neither she nor her daughter ever looked at the pass book, as they testified, until January 13, 1912, when they learned that it only showed $300 deposited July 11, 1911. The pass book and the deposit slip made out by Rudolph only showed a $300 deposit. Rudolph could only remember or testify as to the amount of the deposit by the pass book, the deposit slip and the bank books, and from those testified that she on that date only deposited $300, and that the books showed it all to be currency. He also testified that the deposit slip showed it to be all currency. It was put in evidence and the original is in the record, and as we read it, it clearly shows the $300 to be gold as the figures showing the amount are written in the space for gold, below the one just above for currency, thus corroborating her as to the amount of gold deposited on that date. The evidence

also disclosed that the parties are all Bohemians, and that defendant in error cannot read English or Bohemian, but that she knows figures when she sees them. The daughter can read and write English.

Defendant in error's testimony is contradicted by plaintiff in error in some minor matters to the effect, that she told the Majicoks in January, 1912, that she made her said deposit in August, 1911, instead of July, 1911, and also that she then said she made that deposit by giving the money to Mr. Topinka, another employe at that bank, while at the trial she and Rudolph both testified that the deposit of that date was made to Rudolph. Mr. Topinka also testified that she told him he got the deposit and stole part of it, whom she hunted up and talked to about the matter just after she left the bank January 13, 1912. The testimony also showed that the books of the bank did not show any over cash on July 11, 1911, and Rudolph Majicek and another employe of the bank, Mr. Vasek, testified that Rudolph counted the money at the close of business on that day, and Vasek added the cash deposits registered, and that they balanced, as shown by the books. None of plaintiff in error's witnesses, including himself, could personally remember about the deposit, as to its amount, or as to the character of the items making up the deposit, except as shown by the books.

The burden of proof was upon defendant in error to show that her account at the bank was not correct before she could recover. The reception of the pass book by defendant in error with the entries therein made without examining the same and without complaint constituted an implied acquiescence by her in the correctness of these entries, and they make an account stated between the parties. Such acceptance and acquiescence are not conclusive upon her, if in reality the account was not correct; but it requires as clear and satis-

factory proof to open up the transaction and recover for such mistake as in the case of opening accounts between other individuals, when there has been an account stated between them. First National Bank v. Haight, 58 Ill., 101; Rattig v. Southern Illinois National Bank, 147 Ill. App., 107; Wheelberger v. Knights, 71 Ill. App., 331.

The facts that only three deposits were made by defendant in error in her last bank account, that the deposit in question was the last deposit in that account, and that no checks at all were drawn on her account, are very strong arguments leading to the conclusion that defendant in error was able absolutely to know and to remember approximately how much money she had in the bank, and how much money and the character of money she deposited at the time she made her last deposit. She was corroborated exactly by the deposit slip in the amount of gold she claimed to have deposited at that time, and the jury was warranted in the conclusion that it was a very easy matter for her and her daughter to know with certainty whether the deposit in question was all gold or part gold and part currency. Defendant in error would also be expected under such circumstances to know the exact amount of money she had on deposit, if the sum was exactly expressed in even hundreds or thousands of dollars. She named the precise sum, she had in the bank when she went to get her interest. She named the precise sum missing or not entered in her pass book as $800 in currency. The books and the deposit slip and her pass book contradict her on the vital points, that she deposited $1,300 the last time she made a deposit, and that she had $3,000 on deposit in the bank. The conclusion is almost irresistible that she either had $3,000 on deposit in the bank, or that she and her daughter are willful perjurers.

The evidence of the pass book, and the bank books, together with that of the bank's employes and of plaintiff in

error, as to how they were kept, and that there was no over cash on the date of the last deposit, make a strong case for plaintiff in error, considering the further fact that no complaint was made by defendant in error until six months after the last entry in her pass book. She has the further fact in her favor that she could not read or write.

Proper caution on her part would have suggested to her that she should have had her daughter to examine the book before leaving the bank. On the other hand, proper caution on the part of the bank teller would have suggested to him that he require defendant in error by herself or daughter to have made out her own deposit slip, or to have in some way given written evidence that it was correct. Both were guilty of negligence, and so was plaintiff in error, who testified that it was the bank's custom by his instructions to have the tellers make out the slips of deposit instead of the depositors. We do not mean to intimate that plaintiff in error or any employe of his bank was guilty of fraud or perjury concerning the deposit in question, but our conclusion is that the facts in this case are such that we are not able to say that the verdict of the jury is wrong, or that it is not well supported by the evidence. Had a verdict been rendered for the plaintiff in error, we would have felt equally bound thereby. It is peculiarly a case where the verdict of the jury is binding on us, unless some error of the court or misconduct of the jury has intervened to vitiate it.

There is some showing in the record that the jurors read newspaper accounts of the trial before reaching their verdict that were prejudicial to the plaintiff in error, and that one of the jurors was influenced in arriving at his verdict by newspaper articles against private banks published before he was accepted as a juror, and that another was influenced in reaching his verdict by the fact that the trial

judge gave more heed apparently to the witnesses for the plaintiff in error than to those of defendant in error. All the testimony tending to show such prejudice, however, was given by the jurors themselves in an examination before the court on a motion for a new trial. It is the well established law of this state that neither the testimony of jurors, nor the testimony of outsiders as to facts derived from members of the jury concerning their action as jurors, can be received by the court to impeach their verdict, and, therefore, we can not consider the said testimony of the jurors. Uhlemeier v. Behor, 180 Ill., 456; Phillips v. Town of Bowles Mound, 195 Ill., 353.

The only other point argued by plaintiff in error is that the court erred in allowing defendant in error to prove the profits of plaintiff in error in said bank for the last five years of its existence. Such evidence was inadmissible, but apparently harmless as plaintiff in error testified positively that he made no profits in the bank during that time, and that he made his money out of the real estate business and other business in which he was engaged during that time. No one contradicted him in any way and he was thoroughly examined upon that question by his own attorney. Besides, we have examined the record carefully, and there was no ruling of the court on the question of the relevancy or competency of that testimony, and hence no exception to any such ruling. It is, therefore, not a matter of consideration in this case.

Finding no reversible error in the record, the judgment of the court is affirmed.

JUDGMENT AFFIRMED.

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